

University of Helsinki  
Faculty of Law

**THE LAW, THE SUBJECT AND  
DISOBEDIENCE**

INQUIRIES INTO LEGAL MEANING MAKING

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DOCTORAL DISSERTATION

To be presented for public examination, by due permission of  
the Faculty of Law at the University of Helsinki in Porthania  
Suomen Laki lecture hall, on 8 September 2017 at 12 o'clock

Helsinki 2017

ISBN 978-951-51-3553-7 (pbk.)  
ISBN 978-951-51-3554-4 (PDF)

Unigrafia  
Helsinki 2017

# ABSTRACT

This dissertation consists of five previously published articles and an introduction that presents the theoretical framework, methodology, main arguments and the common themes of the articles. The overall contribution of the research is that it shows how, on one hand, the legal practices reproduce the unified citizen subject, and how the human subject is fragmented in legal practices on the other hand. In other words, this dissertation focuses in producing ‘us’ and ‘the other’ in law.

The first two articles discuss the ways in which ‘us’, the citizen subject, is produced in law by observing how the European Court of Human Rights deflects disobedience and political protests. In the first article, *Disobedient Subjects – Constructing the Subject, the State and Religion in the European Court of Human Rights*, I argue that in the so called headscarf cases, the logic of the legal argumentation can be traced back to the subjectivation of the citizen, as the Court reproduces the way in which the relationship between religion and the state is entangled with the citizen subjectivity. Moreover, my analysis shows that the Court’s approach to religion depends on whether religion is conceptualized as a personal belief system, cultural tradition, or as political.

The second article, *Rebels without a Cause? Civil disobedience, Conscientious objection and the Art of Argumentation in the Case law of the European Court of Human Rights* continues the analysis on the Court’s approach to disobedience. I argue that the political challenge posed to society by the conscientious objector is transformed in legal proceedings into a question of one’s personal right to freedom of religion and belief. It is interesting that the Court’s argumentation strategy in the Islamic headscarf cases is completely opposite to the argumentation used in the cases of conscientious objection to military service. In the headscarf cases, the Court chooses to emphasise the headscarf as a political symbol, whereas it treats conscientious objection as a manifestation of personal belief. It would be perfectly plausible to reverse the two strategies, and regard the headscarf primarily as a manifestation of personal belief, and conscientious objection as a political statement.

In the third article, *Who Belongs? The Turkish Citizen Subject in Turmoil*, I continue to discuss the construction of the modern Turkish citizen subjectivity. For example, a Muslim woman wearing a headscarf, a conscientious objector, Kurds struggling to be recognised as an ethnic minority, and Gezi Park protestors, all pose the same question for the law, as they challenge the prevailing notion of possible identities and aspire to shift the limits of ‘us’ in order to include the excluded, or to question the dynamics of inclusion and exclusion more profoundly. In the third article, my analysis shifts from the European Court of Human Rights to the different means used to challenge Turkish citizen subjectivity in domestic courts, in cabinets of power, and in the streets of Istanbul.

The fourth and the fifth articles move on to discuss othering in law. The fourth article, *The Detainee, the Prisoner, and the Refugee: The Dynamics of Violent Subject Production*, presents my analysis of the dynamics of subject production at the Guantanamo Bay detention centre, the maximum security prisons in the US, and the European refugee camps. My main objective is to explore how reduced legal subjectivities who are vulnerable to violence and exploitation are produced and resisted in these sites, and how resistance, such as hunger striking, exposes the law’s violence.

In the fifth and final article, *Forever Again: How Discursive Strategies Re-legitimate Torture in the US Senate Select Committee’s ‘Torture Report’ and the CIA’s Response*, I discuss how responsibility for torture is deflected in two official documents, namely in the executive summary of the report on the CIA’s use of so-called enhanced interrogation techniques, and in the CIA’s response to its claims. My analysis explains the discursive strategies that allow torture to be simultaneously absolutely prohibited and yet legally practiced.

The five articles are connected by the themes of subjectivity, disobedience, and the law. In the introductory part, I develop these themes further, by examining the fragmentation of the human subject in law and observing how the theories of civil disobedience might contribute to totalising citizen subjectivity.

# ACKNOWLEDGMENTS

This thesis is the result of several years of research at the Faculty of Law at the University of Helsinki. I have been very fortunate to receive the trust and support of many people. Although I cannot mention everybody here, I warmly thank everybody with whom I have had the pleasure of working together.

First and foremost, I would like to thank my supervisors, Assistant Professor Sakari Melander and University Lecturer Samuli Hurri. The most important support a doctoral candidate can have is the feeling that their supervisors believe in them. Sakari Melander has offered his invaluable support consistently throughout the years, and always believed that my work is worthwhile. Samuli Hurri has been the single most influential person for my work, both as a supervisor and as an amazing, inspiring thinker.

I am immensely grateful to the two pre-examiners, Professor Scott Veitch and University Lecturer Susanna Lindroos-Hovinneimo, who have been so generous to take the time to closely read my manuscript and help me to improve it. I am honoured that Professor Veitch accepted the faculty's invitation to act as an opponent during the public examination of this thesis. His fascinating scholarly work has had a significant impact on my own thinking. As a brilliant teacher and scholar Susanna Lindroos-Hovinneimo has inspired my work throughout the years.

My past and present teachers and mentors are especially important to me in my development as a researcher. Thank you, Professor, Dean Kimmo Nuotio, Professor Joxerramon Bengoetxea, Professor Tuula Sakaranaho, Professor Emeritus Raimo Lahti, Assistant Professor Mónica Lopez Lerma, Professor Ari Hirvonen, Professor Panu Minkkinen, Professor Pia Letto-Vanamo, Professor Dan Frände and Professor Raimo Siltala.

I found my group of like-minded people and peer-support at the Law in a Changing World doctoral programme, as well as in other formal and informal gatherings of doctoral candidates and other colleagues. Thank you Kristiina Koivukari, Sanna Mustasaari, Ukri Soirila, Riikka Koulu, Niklas Vainio, Dorota Gozdecka, Magdalena

Kmak, Eliška Pírková, Beata Mäihäniemi, Eleonora Del Gaudio, Aura Kostiainen, Marta Maroni, Hanna Lukkari, Dan Helenius, Heli Korkka, Merita Kettunen, Karri Tolttila, Teija Stanikić, Ville Hiltunen, Daria Kozłowska-Rautiainen, Sanna Koulu, Marjo Ylhäinen and others. I hope we can continue to support each other and work together also in the future.

This dissertation has been funded by grants from Finnish Cultural Foundation, Kone Foundation, Aili and Brynolf Honkasalo Fund, Olga and Kaarle Oskari Laitinen Foundation, Finnish Lawyers' Association, and University of Helsinki Law Fund. In addition, I have been employed by the projects 'Criminal Law under Pressure – In Between Differentiation and Harmonization' led by Sakari Melander, and 'Legal Language of Moral Struggles' led by Samuli Hurri. I am immensely grateful for the financial support I have received.

Working in the research group 'Legal Language of Moral Struggles' with Samuli Hurri, Sanna Mustasaari and Ukri Soirila has been tremendously rewarding. Thank you for your guidance, inspiration, brilliance, and most of all, for a sense of belonging.

The deepest thanks go to my family and friends for their love and support. My parents Raija and Pertti have always encouraged me to follow my own path. My wonderful sisters and their families, Heidi and Sebastian, Outi, Tuomas and Leila, have encouraged and supported me throughout the process. My partner Matti gets me, and I cannot think of anything more important in the process of writing a dissertation or life in general. Thank you for everything, and especially for the Lambretta rides to Porthania.

In Porthania 29 June 2017

# LIST OF ORIGINAL PUBLICATIONS

This dissertation consists of the following articles:

Nieminen, Kati, 'Disobedient Subjects – Constructing the Subject, the State and Religion in the European Court of Human Rights' (2015) 21 (4) *Social Identities* 312–327.

——— 'Rebels without a Cause? Civil disobedience, Conscientious objection and the Art of Argumentation in the Case Law of the European Court of Human Rights' (2015) 5 (5) *Oñati Socio-legal Series* 1291–1308.

——— 'Who belongs? Turkish citizen subject in turmoil' in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds.) *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections* (Routledge 2016) 84–101.

——— 'The Detainee, the Prisoner, the Refugee: Dynamics of Violent Subject Production' (2016 e-pub. ahead of print) *Law, Culture and the Humanities*.

Available at <https://doi.org/10.1177/1743872116650868>.

——— 'Forever Again: How Discursive Strategies Re-legitimate Torture in the US Senate Select Committee's 'Torture Report' and the CIA's Response' (2016) 13 *No Foundations: An Interdisciplinary Journal of Law and Justice* 70–95.





# CONTENTS

## I INTRODUCTION

1. ‘Us’ and ‘the other’ in law .....	1
2. Social constructionism – the theoretical framework .....	5
2.1 Critique of social constructionism.....	11
3. Introduction to the articles.....	13
3.1. ‘Us’ .....	13
3.1.1 Disobedient Subjects – Constructing the Subject, the State and Religion in the European Court of Human Rights .....	13
3.1.2 Rebels without a cause – Civil Disobedience, Conscientious Objection and the Art of Argumentation in the Case Law of the European Court of Human Rights .....	18
3.1.3 Who belongs? The Turkish citizen subject in turmoil .....	22
3.2 ‘The other’ .....	26
3.2.1 The Detainee, the Prisoner, and the Refugee. The Dynamics of Violent Subject Production .....	26
3.2.2 Forever again: How Discursive Strategies Re- legitimate Torture in the US Senate Select Committee’s ‘Torture Report’ and the CIA’s Response.....	30
3.3 Subjectivation and othering in law .....	34

4. The stories we tell ourselves .....	37
4.1. Narrative approach .....	37
4.2 The law.....	41
4.3 The subject .....	49
4.4 Disobedience .....	56
5. Findings and methodological contribution .....	69
Bibliography.....	75

## II THE ARTICLES

# **I INTRODUCTION**



## 1. 'US' AND 'THE OTHER' IN LAW

On 1 December 1955, in Montgomery, Alabama, Rosa Parks was riding the city bus on her return home from work. The first ten seats of the bus were reserved for white passengers. Parks was sitting in the first row after those ten seats, but was asked to move to the back of the bus by the driver, as the bus became crowded. Parks refused, arguing that she was not sitting in a seat reserved for whites. The police arrested Parks and took her into custody, and she was prosecuted for refusing to obey the driver's order. Parks was active in the local National Association for the Advancement of Colored People (NAACP), and the subsequent outrage to her arrest culminated in a bus boycott to protest racial discrimination. That famous boycott lasted 381 days, during which Martin Luther King Jr. first achieved national fame. Parks was convicted, but while her appeal was processed, the US District Court for the region ruled in a similar case, initiated by the disobedience of Aurelia Browder, Susie McDonald, Claudette Colvin and Mary Louise Smith, that racial segregation in public buses was unconstitutional. That ruling was upheld by the Supreme Court in 1956.<sup>1</sup>

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In November 2015, Macedonia closed its borders to all but refugees who could prove their being from Syria, Iraq or Afghanistan. To protest being denied an individual asylum process, a group of refugees at the Idomeni border crossing in Greece went on a hunger strike and sewed their mouths shut.<sup>2</sup>

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<sup>1</sup> Stacey Bredhoff, Wynell Schamel and Lee Ann Potter, 'An Act of Courage. The Arrest Records of Rosa Parks' (*National Archives*) <<https://www.archives.gov/education/lessons/rosa-parks>> accessed 9 January 2017; *Browder v. Gayle* [1956] 142 F. Supp. 707.

<sup>2</sup> Anealla Safdar, 'Refugees sew lips in Greece-Macedonia border protest' *Al Jazeera* (24 November 2015) <<http://www.aljazeera.com/news/2015/11/refugees-hunger-strike-greece-macedonia-border-151123152724415.html>> accessed 9 January 2017.

Eight refugees living in the Calais ‘jungle’ in France, sewed their mouths shut to protest plans to demolish and close the unofficial refugee camp in the spring of 2016.<sup>3</sup>

The newspaper articles do not identify the refugees by name.

\* \* \*

Rosa Parks and other civil rights activists in the US are often celebrated as paragon citizens whose persistence and disobedience led to a more just society, ending racial segregation and securing citizenship rights for African Americans. Civil disobedience is widely regarded as a justifiable form of political protest which, despite being unlawful, ultimately remains loyal to the rule of law and the democratic principle. The protest of the anonymous refugees, on the other hand, appears irrational, and is certainly not celebrated as a democratic way to convey a deep sense of injustice.

The above examples of disobedience and protest illustrate the journey I made when writing this thesis, beginning from my interest in civil disobedience and conscientious objection, moving on to explore other forms of disobedience and resistance, and finding my way back to where I began – but with an entirely new perspective on disobedience, law, and subjectivity. While the initial idea was to identify and analyse real-life legal cases of the European Court of Human Rights (ECtHR, the Court) and thereby explore the ways in which the law positions itself in relation to social and moral questions, it soon became apparent that disobedience, in a broad sense, was often as much about subjectivation and othering as it was about social, political and legal change. For example, the ban on wearing Islamic headscarves in certain public places in Turkey (and France) – in my interpretation – was no longer simply a ban on religious clothing or guarding of the neutrality of the public realm; it was also, and perhaps more importantly, a ban guarding the fundamentals of the nation by reproducing the *good citizen subject*. The good citizen was to reflect a unity of the people and

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<sup>3</sup> Oscar Quine, ‘Calais Jungle refugees sew mouths shut in protest at camp clearance’ *Independent* (4 March 2016) <<http://www.independent.co.uk/news/world/europe/calais-jungle-refugees-sew-mouths-shut-in-protest-at-camp-clearance-a6912806.html>> accessed 9 January 2017.

loyalty to the state. Thus, defying the ban was an act of resistance, a way to challenge the subjectivity of a good citizen, and a claim for the right to define oneself. Similarly, refusing to serve in the military could be regarded not only as a claim of right to follow one's individual conscience, but also as a refusal to identify oneself with the militaristic citizen subject.

Once I began to analyse disobedience from the point of view of subjectivation, I began to expand my research beyond the case law of the European Court of Human Rights. Simultaneously, having discovered in my case analysis that the effects of legal argumentation seep outside the legal sphere in unexpected ways, I began to question of what the law does besides providing answers to legally formulated questions. These shifts in my approach led me to explore the workings of the law outside the courtrooms.

This thesis consists of five articles, all of which discuss subjectivation and othering in law. The overall contribution of this research is that it shows how, on one hand, the legal practices reproduce the unified citizen subject, and how the human subject is fragmented in legal practices on the other hand. In other words, this dissertation focuses on the ways in which the law produces 'us' and 'the other'. The first three articles, focusing on Turkey, explore the ways in which the law reproduces the citizen subject in ways that deflect political protests and initiatives for change. The last two articles, focusing on Europe and the USA, address the law's othering practices.

The process of othering is here used to describe the subjectivation of 'the other' in relation to and as hierarchically inferior to 'us'. Foucault is one of the scholars who argues that we constitute ourselves through excluding others.<sup>4</sup> For Foucault, the subject is not the pre-existing subject of knowledge and freedom, fostered, for example, in much of legal theory. Rather, the subject is historically contingent and discursively constituted.<sup>5</sup> Foucault explains that the subject is created as an observable object by producing hierarchical dichotomies, which simultaneously identify what the subject is, and differentiate it from what it is not, thus

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<sup>4</sup> Michel Foucault, 'The Political Technology of Individuals' in James D. Faubion (ed.) *Power. Essential Works of Foucault 1954–1984* (Penguin Books 2002) 403.

<sup>5</sup> Michel Foucault, 'Truth and Juridical Forms' in James D. Faubion (ed.) *Power. Essential Works of Foucault 1954–1984* (Penguin Books 2002) 3–4.

creating a constitutive relationship between the opposites – the sane and the mad, the healthy and the sick, the good citizen and the criminal.<sup>6</sup> The logic of dichotomies is othering. This means that ‘the other’ is nothing in its own right so it only contains that which the first is not. Consequently, the abnormal is what normal is not, barbarity is what civilisation is not, animal is what human is not, woman is what man is not, and the other is what we are not.<sup>7</sup>

The first three articles, *Disobedient subjects*, *Rebels without a cause* and *Who belongs*, all concentrate on the construction of the Turkish citizen subject. The reason for my interest in Turkey is that the birth of the Turkish citizen is firstly relatively recent, and secondly, founded on a radical eradication of the Ottoman history, which has resulted in a deep-rooted tension within the modern Turkish citizen subjectivity. This tension is reflected in the ECtHR cases, in the various ways that the Turkish authorities have responded to the political parties based on religion or ethnic identities, in the conflict with the Kurdish population, and in the protests at Gezi Park in 2013. These all reflect the tension between the ideal of a secular, ethnically unified and loyal citizen subject, and the reality of religious, ethnic, and political plurality.

It was the case of *Saygılı and Falakaoğlu v. Turkey (No 2)*<sup>8</sup> discussed in *Rebels without a cause* which briefly touched on the subject of hunger striking. This sidetrack that I began to follow led me to the sites of maximum security prisons in the US (the supermax), the Guantanamo Bay detention center, and to the European refugee camps. Hunger striking as resistance seemed interesting from the viewpoint of subjectivation and law; the hunger striker seemed to speak in a language foreign to the law, and the law incapable of grasping the hunger-striking subject. Hunger striking as resistance is something the law cannot process. This theme is discussed in the fourth article, *The prisoner, the detainee, and the refugee*, in which I argue that hunger striking, among other forms of self-harm, can be perceived as a means of maintaining one’s own identity in the face of ‘world-destroying pain’, borrowing the words

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<sup>6</sup> Michel Foucault, ‘The Subject and Power’ in James D. Faubion (ed.) *Power. The Essential Works of Michel Foucault* (Penguin Books 2002) 326, 329; Kai Alhanen, *Käytännöt ja ajattelu Michel Foucault’n filosofiassa* (Gaudeamus 2007) 21.

<sup>7</sup> Zygmunt Bauman, *Modernity and ambivalence* (Polity Press, 1991) 14.

<sup>8</sup> *Saygılı and Falakaoğlu v. Turkey (No 2)* App no 38991/02 (ECtHR, 17 February 2009).



of Robert M. Cover.<sup>9</sup> On the other hand, the Guantanamo Bay detention center, the supermax prison, and the refugee camp, are sites of othering.

The mirror image of ‘us’ is produced not only in the physically violent practices adopted in Guantanamo Bay, the supermax, and the refugee camp, but also discursively. The report by the US Senate Select Committee on Intelligence (SSCI) on the CIA’s use of the so-called enhanced interrogation techniques during the Rendition, Detention and Interrogation Program (RDI), and the CIA’s response to the claims made in the report are discussed from this perspective in the last article, *Forever again*. In it, I observe othering in discursive practices and analyse, how ‘depersonalized persons’<sup>10</sup> are created in a discourse that I conceptualise as legal, despite taking place in non-legal documents. Law, in this context, is a discursive resource that can and does have influence outside the judicial practices.

This thesis consists of an introduction and five previously published articles, all addressing subjectivation and othering. The common themes, namely the law, subjectivity, and disobedience, are discussed and developed further in the fourth section under the title ‘The stories we tell ourselves’. But I will first introduce the theoretical framework and the research questions, materials, methods and the main arguments of each article.

## **2. SOCIAL CONSTRUCTIONISM – THE THEORETICAL FRAMEWORK**

My work draws heavily from discourse analysis,<sup>11</sup> and is entirely based on the idea of social constructionism. Having my background in the humanities as well as in the law, constructionist approach to

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<sup>9</sup> Robert M. Cover, ‘Violence and the Word’ (1986) 95 *Yale L J* 1601, 1604.

<sup>10</sup> Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2013) 32.

<sup>11</sup> Discourse here means ‘a particular way of representing certain parts or aspects of the (physical, social, psychological) world’. Norman Fairclough, *Critical discourse analysis: the critical study of language* (Longman applied linguistics, 2nd edn 2010) 358.

law came naturally to me. Like concepts such as culture, religion, and society, the concept of law must be constructed anew in every research, as it escapes and exceeds definitions; the ‘inside’ and ‘outside’, and the ‘insiders’ and ‘outsiders’<sup>12</sup> of law are not something pre-existing and something to be taken for granted, but something that is constructed.<sup>13</sup> One of the aims of this particular research is to observe how the ways in which the ‘inside’ and ‘outside’ of law are constructed affect the extent to which the law can be held accountable for what it does: the law cannot be held accountable for all that it causes, if the law’s (discursive and tangible) violence is conceptually outsourced e.g. to the spheres of politics or force, or if it is blamed on erroneous application of the law.

The branch of social constructionism I identify with draws from postmodern thinking. Pulkkinen explains the difference between modern and postmodern: both are ‘modes of thought or cultural attitudes’, but whereas modern attitude ‘is in search of foundation’, which ‘presents a purifying motion focused on a basic core’, postmodern is ‘defined as anti-foundational’.<sup>14</sup> Thinking in terms of ‘inside’ and ‘outside’ is typical for modern mode of thought. While it is not possible to get rid of using dichotomous words, and while the postmodern does not oppose dichotomies in general, the postmodern contests the emphasis on these types of distinctions and problematizes thinking in their terms. Pulkkinen reminds that the point of the postmodern is not to emphasise the ‘surface’ instead of the ‘foundation’ (e.g. ‘gender’ over ‘sex’, or ‘nurture’ over ‘nature’<sup>15</sup>), but to oppose the logic of and emphasis on the dichotomies themselves.<sup>16</sup>

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<sup>12</sup> See e.g. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 5–6.

<sup>13</sup> Constructionist approach does not take e.g. the institutional settings or social structures as pre-given, but is interested in the ways in which they are produced in action and speech. See e.g. Jonathan Potter and Alexa Hepburn, ‘Discursive Constructionism’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 289.

<sup>14</sup> Tuija Pulkkinen, *The Postmodern and Political Agency* (SoPhi 1996) 37; see also Darin Weinberg, ‘The Philosophical Foundations of Constructionist Research’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 15–16.

<sup>15</sup> See e.g. Tuija Pulkkinen, *The Postmodern and Political Agency* (SoPhi 1996) 144–156.

<sup>16</sup> Tuija Pulkkinen, *The Postmodern and Political Agency* (SoPhi 1996) 38, 171. See also e.g. Zygmunt Bauman, *Modernity and ambivalence* (Polity Press 1991) 98–101;

The constructionist starting point is that language imposes meaning and manipulates our perception; in other words language is reality-constitutive instead of representational. Thus, social constructionism indicates a critical stance towards taken for granted knowledge and seemingly natural categories. Even the categories we often perceive as natural, unquestionable, and universal, are approached as historically and culturally contingent. To express it succinctly, I commit to the idea that there is no essence to things, and that which we perceive as natural or real, is a construction.<sup>17</sup> The implications for this are not only theoretical because knowledge and social action go together.<sup>18</sup>

Saussure's influence on social constructionism is crucial. He asserted that the link between the signifier (the spoken sound) and the signified (the concept) is arbitrary, but further expressed that the categories and the concepts themselves are arbitrary divisions and categorisations of our experience. Thus, language profoundly produces and molds our perceived realities, and does not simply reflect and reiterate it.<sup>19</sup> Language can therefore be understood as a site of meaning production. Departing from Saussure, the postmodern approach to language abandons the idea of language as a fixed, albeit arbitrary, system, and embraces the idea of meaning being incessantly contestable.<sup>20</sup> Reality, or rather what is perceived as reality, is therefore created by constructing meaning – meaning in the sense of knowledge and truth, not only as the relationship between the signifier and the signified; we 'account for, explain, blame, make excuses, construct facts, use cultural categories, and present [ourselves] to others in specific ways, taking the interpretive context into account'.<sup>21</sup> Thus, discursive approach differs from speech act theory in that it considers language 'wholly

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Costas Douzinas and Adam Gearey, *Critical jurisprudence: the political philosophy of justice* (Hart Publishing 2005) 48; cf. Zygmunt Bauman, *Postmodernity and its discontents* (Polity, 1998) 16.

<sup>17</sup> Peter L. Berger and Thomas Luckmann, *The social construction of reality: a treatise in the sociology of knowledge* (Penguin 1971) 249.

<sup>18</sup> Vivien Burr, *Social constructionism* (3<sup>rd</sup> edn Routledge 2015) 2–8, 18, 29.

<sup>19</sup> Ibid 51, 46, 52.

<sup>20</sup> Ibid 54.

<sup>21</sup> Pirjo Nikander, 'Constructionism and Discourse Analysis' in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 415.

and thoroughly performative', instead of dealing 'merely with decontextualized sentences'.<sup>22</sup>

By abandoning essentialism, social constructionism also rejects the unitary individual and insists that subjectivities are socially constructed.<sup>23</sup> This makes discursive, social constructionist, approach appropriate for analysing subjectivation and othering, as the social relationships are not just social products, but also social processes.<sup>24</sup>

Discourse analysis approaches texts in a fundamentally different way than doctrinal legal research. For a legal scholar engaging in doctrinal research, the challenge is to interpret 'facts' and 'norms', whereas the discourse analyst is interested in the ways in which (legal) texts (and practices) produce those 'facts' and 'norms' as well as the ways in which they construct reality in general.<sup>25</sup> In this thesis it means that the law's constructedness is taken as a starting point for inquiry into the ways in which the law produces subjectivities in its practices. Law's constructedness does not simply mean that the law is thoroughly political or meshed with morals. Instead the focus is on the ways in which the law is constructed in relation to these other spheres, and for what purposes.

This thesis explores the ways that meaning is produced both in discursive and other social practices, all embedded in the legal. In addition to language, meaning can also be produced in practices, as not only words, but for example gestures and objects can also convey meaning. An example of an object turned into a sign is a knife as a 'sign' of violence;<sup>26</sup> everyone knows how easy it is to only use gestures to communicate contempt. In my analysis, I study how

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<sup>22</sup> Shi-xu, *A Cultural Approach to Discourse*. (Palgrave Macmillan 2004) 28.

<sup>23</sup> Peter L. Berger and Thomas Luckmann, *The social construction of reality: a treatise in the sociology of knowledge* (Penguin 1971) 149; Vivien Burr, *Social constructionism* (3<sup>rd</sup> ed edn Routledge 2015) 88–103, 185–186; Mark Currie *Postmodern Narrative Theory* (Macmillan Press: St. Martin's Press 1998) 104.

<sup>24</sup> Shi-xu, *A Cultural Approach to Discourse*. (Palgrave Macmillan 2004) 30–31.

<sup>25</sup> Johanna Niemi-Kiesiläinen, Päivi Honkatukia and Minna Ruuskanen, 'Legal Texts as Discourses' in Åsa Gunnarsson, Eva-Maria Svensson and Margaret Favies (eds.) *Exploiting the Limits of Law. Swedish Feminism and the Challenge to Pessimism* (Ashgate 2007).

<sup>26</sup> Peter L. Berger and Thomas Luckmann, *The social construction of reality: a treatise in the sociology of knowledge* (Penguin 1971) 55; Vivien Burr, *Social constructionism* (3<sup>rd</sup> ed edn Routledge 2015) 186. See also Norman Fairclough, *Critical discourse analysis: the critical study of language* (Longman applied linguistics, 2<sup>nd</sup> ed edn Pearson education 2010) 952.

subjectivities are produced and contested in non-discursive communicative practices, such as torture. While the violent practices target the physical body, my focus is not on the bodily experience of pain, or on the body in acts of violence and resistance. Instead my argument is that physical violence, as well as words, construct less-than-human subjectivities. The bodily subject is produced in myriad social practices, some of which are discursive, others very tangible.<sup>27</sup> My aim is to question matters that seem self-evident and ask whether they could be otherwise. In this sense, my research can be described as critical, as its aim is to identify gaps in what the law says it does, and what it in fact does.<sup>28</sup> However, rather than providing answers to how these gaps can be filled, my aim is to make visible those mechanisms of meaning making that contribute to othering, and to make my own contribution to the methodology for analysing legal argumentation.

While the social constructionist approach means abandoning the search for the ‘core’ or ‘essence’ of the law, it does not free one from defining the law for the purposes of research. For this reason, I need to remind the reader that my own work is also based on constructions. To mention a few, these are constructions of the law, the political and social contexts of the case law, the categorisations I formulate regarding disobedience and subjectivities, and the practices of torturing and martyring. As for everyone else, the researcher has no objective and pre-existing phenomena to use as research material. Thus, to ask cogent, coherent and researchable research questions, one must construct a relatively coherent object of research.<sup>29</sup> Fairclough cautions against taking research topics for granted: we should not assume that topics such as ‘terrorism’, ‘immigration’ or ‘the law’ as being obvious, pre-existing entities that

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<sup>27</sup> See e.g. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999) 107–193; Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press 1997) 84–86; Judith Butler, *Bodies that Matter: On the Discursive Limits of “Sex”* (Routledge 1993) x–12; see also Jonathan Potter and Alexa Hepburn, ‘Discursive Constructionism’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 289–291; Bryan S. Turner, ‘The Constructed Body’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 500.

<sup>28</sup> See Norman Fairclough, *Critical discourse analysis: the critical study of language* (Longman applied linguistics, 2nd ed edn Pearson education 2010) 231.

<sup>29</sup> Ibid 5.

can be analysed without first theorising about them.<sup>30</sup> This approach makes it impossible to make a clear division between theory and methodology.<sup>31</sup> The implications of my own constructions for the methodology of legal research are discussed in section 5.

For me, and for the purposes of this thesis, law is not only the doctrine (the ‘inside’) or the practices of the ‘insiders’ (e.g. the judge, the officials, advocates etc.) but also legal discourses regardless of the status of the person recouring to them. For example, a person in the streets in the midst of a dispute over parking, yelling to another person, ‘I’ll sue you!’ can be understood to be using the law, and therefore that which they are able to bring into the dispute with a single reference to the law, is an example of what the law does in the world. The law is not only used by legal professionals, administrators, executives, or parties to legal disputes; it is used everywhere and by anyone who uses legal language and the logic of law. For example, this type of perception resonates in Veitch’s understanding of the law. For Veitch, the law is not limited to legal norms and judicial practices, but instead he perceives the social, economic and political structures of our societies as being deeply embedded in the legal and influenced by it even if not explicitly juridified.<sup>32</sup> In other words, even the absence of regulation does not indicate the absence of law.

The question of power is entangled in the premises of social constructionism. As will be discussed below, the knowledge we produce profoundly affects our understanding of what we think is acceptable. For example, our understanding of the ability of other animals to experience pain and to form social bonds, etc., affects what we consider to be an acceptable way to treat them. Similarly, ‘[w]hat is possible for one person to do to another, under what rights and obligations, is given by the version of events currently taken as knowledge’.<sup>33</sup> This Foucauldian understanding of power,

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<sup>30</sup> Ibid 235–236.

<sup>31</sup> Pierre Bourdieu and Loïc J. D. Wacquant, *An invitation to reflexive sociology* (Polity Press 1992) xiv, 332; Norman Fairclough, *Critical discourse analysis: the critical study of language* (Longman applied linguistics, 2nd ed edn Pearson education 2010) 413–414.

<sup>32</sup> Scott Veitch, *Law and irresponsibility: on the legitimation of human suffering* (Routledge-Cavendish 2007) 61–63, 65–66, 82, 83, 86.

<sup>33</sup> Vivien Burr, *Social constructionism* (3<sup>rd</sup> ed edn Routledge 2015) 68.

not as something that can be possessed, but as an effect of discourse, allows us to analyse our definitions and representations from the perspective of the type of knowledge and power relations they (re)produce.<sup>34</sup> These ideas are developed further in section 4, drawing from the common themes of the articles.

## 2.1 CRITIQUE OF SOCIAL CONSTRUCTIONISM

Social constructionism has been criticized for not being able to capture the embodied, physical reality. Some have even accused social constructionism of denying the existence of the physical world altogether. The simple answer to this critique is that constructionism does not mean denying the existence of, say, earthquakes or falling bricks;<sup>35</sup> instead it denies the possibility that they could be understood outside of discourse, as if the world came ‘ready-made in categories of events and types of objects’.<sup>36</sup> In fact, social constructionism reminds that the mind-matter dichotomy itself is a construction. I will not further address the question of what the ‘reality’ ‘really’ consists of in the theory of social constructionism, as that topic is well covered elsewhere.<sup>37</sup> Nonetheless, I do want to emphasise that by insisting that what is real to us is socially constructed, I do not mean that our experiences, bodies, identities, life narratives, etc., are illusionary, non-existent or unimportant. Following Berger and Luckmann, it can be proposed that concept of the world being socially constructed *and* experienced as pre-given and fixed are not

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<sup>34</sup> Ibid.

<sup>35</sup> Laclau and Mouffe 1985, 108 as cited in Shi-xu, *A Cultural Approach to Discourse*. (Palgrave Macmillan 2004) 25.

<sup>36</sup> Vivien Burr, *Social constructionism* (3<sup>rd</sup> ed edn Routledge 2015) 89; see also Sara Mills, *Discourse* (Routledge 1997) 50.

<sup>37</sup> See e.g. Joel Best, ‘Historical Development and Defining Issues of Constructionist Inquiry’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 45–46; Vivien Burr, *Social constructionism* (3<sup>rd</sup> ed edn Routledge 2015) 2–8, 18, 29, 88–103, 185–186; Mark Currie *Postmodern Narrative Theory* (Macmillan Press: St. Martin's Press 1998) 35–36, 45–48, 89–90; Jonathan Potter and Alexa Hepburn, ‘Discursive Constructionism’ in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 277, 287–288.

mutually exclusive.<sup>38</sup> Thus, social constructions cannot be equated with something that is false, imaginary or inauthentic.

Another typical critique of social constructionism and postmodern concerns relativism. This line of critique accuses constructionism and postmodern approaches of resulting in moral judgments becoming impossible and unfounded, as the idea of a coherent subject is abandoned, as well as the idea of universally valid morality, or, regarding the law, inherent moral core of the law. It can be argued, however, that a person being conceived as entirely socially constructed is not mutually exclusive with being morally and politically responsible judging person. Moreover, accepting the lack of universal validity of claims of justice does not make judging impossible or unfounded. Instead, it simply denies the possibility of backing one's judgments up with claims of universality, and acknowledges that regarding justice, indisputability cannot be achieved.<sup>39</sup>

Renouncing universality and the possibility of an inherent normative core of the law does not mean that one cannot have ethical commitments. For a legal scholar engaging in doctrinal or jurisprudential research this means that the ethicality of law must be constructed in the law in compliance with the legal methodology. For a researcher such as myself whose research interests are empirical, questions relating to the normativity of law are not in the focus. Any normative claims I make in my own research do not concern the correct interpretation or the 'essence' of the law; my ethical commitment to values such as the equality of human beings, however, is hopefully clear for the reader in my texts. My claims on the question of how the law works, on the other hand, are intended as empirical observations rather than as immanent critique. That said, my work may contribute to normative legal research by making the legal argumentation more transparent, as my research interest is making visible the way in which the subject is

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<sup>38</sup> Peter L. Berger and Thomas Luckmann, *The social construction of reality: a treatise in the sociology of knowledge* (Penguin 1971).

<sup>39</sup> Tuija Pulkkinen, *The Postmodern and Political Agency* (SoPhi 1996) 200–203; see also Joel Best, 'Historical Development and Defining Issues of Constructionist Inquiry' in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 55–56; Leslie Miller, 'Foucauldian Constructionism' in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 267–268.



constructed in the processes of (legal) meaning production.<sup>40</sup> The discourses of othering, which constitute not only ‘the other’ but ‘us’ as well, are deconstructed in my work in the sense that their constructedness and the construction processes are made transparent.<sup>41</sup> If the categories we use in order to make sense of the world are contingent and do not reflect ‘the real’, dismantling those categories inevitably changes the way we perceive things and perhaps opens up possibilities for re-interpretation.<sup>42</sup>

The following section introduces the main arguments and the research methods of the articles in more detail. The first three articles relate to the subjectivation of ‘us’, the good citizen subject, while the last two discuss othering.

### **3. INTRODUCTION TO THE ARTICLES**

#### **3.1. ‘US’**

##### **3.1.1 DISOBEDIENT SUBJECTS – CONSTRUCTING THE SUBJECT, THE STATE AND RELIGION IN THE EUROPEAN COURT OF HUMAN RIGHTS**

In Turkey, the relationship between religion and the state is tense and entangled with citizen subjectivity. This observation led me to consider the headscarf cases from the perspective of disobedience, as wearing the headscarf was not treated simply as a personal choice or an expression of belief, but was regarded ultimately as challenging the unity of the nation. The cases analysed in the first article, *Disobedient subjects*, were selected through a gradual

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<sup>40</sup> See Vivien Burr, *Social constructionism* (3<sup>rd</sup> edn Routledge 2015) 17.

<sup>41</sup> See *ibid* 18.

<sup>42</sup> *Ibid* 3; see also Susan S. Silbey, ‘A Sociological Interpretation of the Relationship between Law and Society’ in Richard John Neuhaus (ed.) *Law and the Ordering of Our Life Together* (William B. Eerdmans Publishing Company 1989).

process. I was interested in the ways in which the Court approaches and conceptualises Islam in the cases concerning Turkey. The impetus for this interest was the obvious prejudice against Islam in the famous cases of *Refah partisi v. Turkey*<sup>43</sup> and *Leyla Şahin v. Turkey*<sup>44</sup>. For example, in the *Refah* case, the Court identified Islam rather straightforwardly in terms of totalitarianism and being contrary to democracy.<sup>45</sup>

The provisional analysis revealed that most of the cases concerning Islam could be categorised into three groups: the headscarf cases, cases concerning education, and cases concerning blasphemy. Further analysis indicated that religion was constructed differently by the Court in these categories. For the headscarf cases, the political aspects of Islam were deemed to be predominant, whereas in the context of education, Islam was treated as a cultural tradition. And in blasphemy cases, Islam was regarded as a personal belief system. In order to confirm the observation that religion was being conceptualised differently depending on the context, and to assess the alleged Christian bias, I searched for cases concerning Christianity for a comparison. The cases concerning blasphemy (*Otto Preminger v. Austria*<sup>46</sup>; *Wingrove v. UK*<sup>47</sup>; *Murphy v. Ireland*<sup>48</sup>) and education (*Folgerø v. Norway*<sup>49</sup>) confirmed that religion, be it Islam or Christianity, is conceptualised in these contexts either as a personal belief or as a cultural tradition. However, cases concerning religious attire and symbols (*Leyla Şahin v. Turkey*; *Doğru v. France*<sup>50</sup>; *Ahmet Arslan v. Turkey*<sup>51</sup>; *S.A.S. v. Turkey*<sup>52</sup>; *Lautsi v. Italy*<sup>53</sup>) indicate that only the Islamic headscarf is politicised by the Court.<sup>54</sup> According to my analysis, a Christian bias can be detected in the way the Court

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<sup>43</sup> *Refah partisi (the Welfare party) and others v. Turkey* ECHR 2003-II.

<sup>44</sup> *Leyla Şahin v Turkey* ECHR 2005-IX.

<sup>45</sup> *Refah partisi (the Welfare party) and others v. Turkey*, paras 101, 103.

<sup>46</sup> *Otto-Preminger Institut v. Austria* (1994) Series A no 295.

<sup>47</sup> *Wingrove v. The United Kingdom* ECHR 1996-V.

<sup>48</sup> *Murphy v. Ireland* ECHR 2003-IX.

<sup>49</sup> *Folgero v. Norway* ECHR 2007-III.

<sup>50</sup> *Doğru v. France* App no 27058/05 (ECtHR, 4 December 2008).

<sup>51</sup> *Ahmet Arslan and others v. Turkey* App no 41135/98 (ECtHR, 23 February 2010).

<sup>52</sup> *S.A.S. v. France* ECHR 2014.

<sup>53</sup> *Lautsi and others v. Italy* ECHR 2011.

<sup>54</sup> See also *Eweida and others v. The United Kingdom* ECHR 2013.

reproduces the image of political Islam in certain contexts, rather than a pervasive and overall bias against Islam.

The headscarf and full-face veil cases in the ECtHR are exemplary of the slickness of the legal argument. The Court tries and repeatedly fails to create and address the crux of the matter, ultimately revealing that there is none. This is obvious from the inconsistent way the Court produces crucial ‘similarities’ and ‘differences’ between the cases. For instance, in *Ahmet Arslan v. Turkey*, the Court did not find the religious attire of the members of *Aczdimendi tarikati* who wear turbans and black tunics as having a ‘proselytising effect’, while in the headscarf cases of *Doğru v. France* and *Dahlab v. Switzerland*, the Court did rule that the headscarf had that effect. According to the Court, this was because the context in the latter two cases was educational rather than the public sphere in general, as was the case in *Ahmet Arslan*. Nonetheless, in *Lautsi v. Italy*, pursuant to the Court, a religious symbol did not have a proselytising effect despite the context again being educational. This was because the symbol, namely the crucifix, represented cultural tradition rather than religion. In the most recent of the headscarf cases, *S.A.S. v. France*, the context was the same as in the case of *Ahmet Arslan*, namely any public place. This time, the Court did not discuss the potential proselytising effect of the full-face veil, but instead commented on the alleged detrimental effect the veil might have for interpersonal relationships between the people, and therefore for democracy itself.

Both in *Leyla Şahin* and *S.A.S.*, the applicant claimed that wearing a headscarf was their own free choice. In both cases, the Court emphasised, following the governments’ argumentation, the way other people allegedly perceive the headscarf and the full-face veil. In other words, the Court constructed a national context in which the headscarf was perceived as a religious duty imposed on women, or as a political statement. In this type of context, Leyla Şahin and the applicant in *S.A.S.* could be perceived as political actors irrespective of their own claims of what the headscarf symbolised for them. My argument here is not that the meaning of a symbol should be determined by the person using it, but that the Court actively participates in meaning making when it interprets the meaning of the headscarf. Further, as I observe in *Disobedient*

*subjects*, these discursive moves allowed the Court to place *public order* on the legal scales, which would not have been possible had the headscarf been constructed solely in terms of expression of personal belief. I demonstrate that while the Court's argumentation in each case concerning religious symbols and clothing seemingly addresses the extent of freedom of religion, it is, in fact, entangled in a whole set of other issues, stemming from the role of religion within the nation state on the one hand, and the constitution of the citizen subject on the other.

The ideas expressed above illustrate how the Court reproduces meaning and participates in the struggle over what the Islamic headscarf signifies. An illustrative example of the politicisation of the headscarf is the way in which 'the Muslim headscarf affair' began in France in 1989. The director of a secondary school in Creil decided to exclude three girls wearing the headscarf because he considered the scarf to undermine the secularity principle. The Conseil d'État found otherwise, and stated that the pupils could make their own decisions on the matter. Yet in 1994, the issue resurfaced when the Minister of Education declared that the headscarf was a 'conspicuous sign in itself' and reflected a proselytising attitude. However, the Conseil d'État maintained its previous position. Only at the beginning of 2000, the debate became heated and finally led to the prohibition of the headscarf in public schools as well as to the later prohibition of the full-face veil in all public places.<sup>55</sup> In its ruling in *S.A.S.*, the Court cited what is referred to as the Stasi report,<sup>56</sup> which called for banning the Islamic headscarves in schools in order to preserve Republican values. The Court's approach effectively effaced the process of politicising the headscarf, initiated by the French state, and made it appear as if the headscarf was somehow an inherently political symbol.

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<sup>55</sup> See Patrick Simon and Valérie Sala Pala, "We are not all multiculturalists yet" France swings between hard integration and soft anti-discrimination' in Steven Vertovec and Susanne Wessendorf (eds.) *The Multiculturalism Backlash. European discourses, policies and practices* (Routledge 2010).

<sup>56</sup> The president appointed a commission of enquiry, headed by Bernard Stasi, for the question of secularity in French schools. The report, published in 2003, recommended a law that would prohibit the display of any 'conspicuous religious signs' in public schools. See Talal Asad, 'French Secularism and the "Islamic Veil Affair"' (2006) 8(1, 2) *The Hedgehog Review* 95.

The point I wish to reiterate by revisiting the debate over Islamic clothing in relation to disobedience and subjectivity is that the lack of essence in language inevitably makes ‘the course of the legal argumentation somewhat unpredictable – and at the same time perfectly consistent’.<sup>57</sup> Language is unpredictable and porous in the sense that ‘the outcome of the cases cannot be predicted based on the explicit argumentation of the previous case law, and consistent in the sense that the logic of the legal argumentation can be traced back to the subjectivation of the citizen’.<sup>58</sup> Because the Muslim woman wearing the headscarf or the full-face veil is ‘the other’, her self-identification *both* as a devout Muslim *and* as a ‘Western’ citizen is rejected. The Muslim woman wearing the headscarf or the full-face veil cannot be included in ‘us’, because that would dismantle the distinction between ‘us’ and ‘the other’, therefore dismantling not only ‘the other’, but ‘us’ as well.<sup>59</sup> For the same reason, the Turkish law is reluctant to recognise religious and ethnic minority identities.

The headscarf cases demonstrate that the law (re)produces subjectivities both implicitly and explicitly. The most profound, usually implicit, subject of law is the autonomous liberal subject detected by many critical legal scholars. The headscarf cases offer glimpses of the implicit characteristics required from the proper citizen – the one on top of the hierarchies of citizenship,<sup>60</sup> as the cases force the law to explicate them.

The dynamics of othering revealed by the headscarf cases have taken different directions in France and in Turkey, despite them both being advocates of the secularity principle (*laïcité*, *laiklik*). Mullally argues that in France, the *laïcité* principle has become an instrument of boundary maintenance not only in the public sphere,

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<sup>57</sup> Kati Nieminen, ‘Disobedient subjects - constructing the subject, the state and religion in the European Court of Human Rights’ (2015) 21(4) *Social Identities* 312.

<sup>58</sup> Kati Nieminen, ‘S.A.S. v. France: Law, Islamophobia and the full-face veil ban’ (Unpublished manuscript 2017). This does not mean that the result is pre-determined, because the Court could decide to conceptualize religion differently at any time, or to reach a different conclusion despite the conceptualizations.

<sup>59</sup> Kati Nieminen, ‘S.A.S. v. France: Law, Islamophobia and the full-face veil ban’ (Unpublished manuscript 2017).

<sup>60</sup> See Siobhán Mullally, ‘Gender equality, citizenship status, and the politics of belonging’ in Martha Albertson Fineman (ed.) *Transcending the boundaries of law. Generations of feminism and legal theory* (Routledge 2011) 201; Sherene Razack, ‘Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages’ (2004) 12 (2) *Feminist Legal Studies* 155.

but also in the private sphere. For example, in 2008, the Conseil d'État denied Mme M citizenship, a Moroccan citizen whose four children were all French nationals, due to her 'insufficient assimilation' into France. According to the court, Mme M 'had adopted a radical religious practice, which was incompatible with the essential values of French society'. The radical practices of Mme M included wearing the *niqab*, maintaining links to her culture of origin, and confining her daily life predominately to the private sphere of her home.<sup>61</sup> In France, the secularity principle has apparently invaded the private sphere, whereas in Turkey, religious symbols, such as the headscarf, are increasingly tolerated in public.

### **3.1.2 REBELS WITHOUT A CAUSE – CIVIL DISOBEDIENCE, CONSCIENTIOUS OBJECTION AND THE ART OF ARGUMENTATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

The collection of the case material in the second article, *Rebels without a cause*, was based on my analysis of the elements related to civil disobedience and conscientious objection in theories on civil disobedience. The theoretical discussion on civil disobedience is diverse and has a long history, but certain overarching features can be identified, such as the communicative function of disobedience, and the disobedient's overall fidelity to the legal order. By using the Hudoc database, it was relatively easy to find cases of conscientious objection to military service, as conscientious objection could be used as a search term. Finding examples of civil disobedience in case law, on the other hand, required a broader approach. I searched for cases that concerned political protests and campaigning for social change, and one case led to another. These freedom of expression cases concern published material that is critical of the army and the state's treatment of its minority

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<sup>61</sup> Siobhán Mullally, 'Gender equality, citizenship status, and the politics of belonging' in Martha Albertson Fineman (ed.) *Transcending the boundaries of law. Generations of feminism and legal theory* (Routledge 2011) 194–195.

populations. The Court's approach to them indicates that the law is tolerant of opinions that are unlikely to invoke any serious challenge for the status quo – of 'ineffectual troops of leafleteers'<sup>62</sup> – but wary of protests that are not confined in 'mere criticism'.<sup>63</sup> The cases are by no means intended to be a comprehensive collection of ECtHR cases of civil disobedience or conscientious objection<sup>64</sup>, but the cases cited here serve as illustrative examples of the different forms that disobedience takes, and the collection presented here constitutes an attempt to identify 'real-life' cases of the law's encounters with disobedience.

The main argument in *Rebels without a cause* is that the Court's chosen path of argumentation in the selected cases neutralise the potential for profound social and political change, such as re-thinking the militaristic state. This can be achieved within the law either by labelling the disobedient act as a private matter lacking significant political dimensions, or by labelling the act as violent and/or undemocratic. Conscientious objection to military service has been treated by the Court as a matter of personal conviction, not as a political statement falling within the scope of freedom of expression. This line of legal evaluation is not as self-evident as it might seem. For example, some of the applicants have been active in anti-militarist social movements and publicly defended their pacifist views. Their attempt to challenge the militaristic ideal of a citizen has been silenced by the Court. Christodoulidis and Veitch discuss the law's 'logic of misreading, where what is at stake is nothing less than the expressability of a statement as political'.<sup>65</sup> They suggest both that the law silences the political claim itself and that this silencing is unchallengeable, making the law a source of double silencing.<sup>66</sup> To a large extent, the law's meaning making is also unchallengeable, that is, how the Court conceptualises and contextualises the material it considers relevant. Further, my analysis reveals that what is categorised as undemocratic or violent

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<sup>62</sup> Dissenting opinion in *Arrowsmith v United Kingdom* (1977) 3 EHRR 218.

<sup>63</sup> *Saygılı and Falakaoğlu v. Turkey* (No 2) para 28.

<sup>64</sup> See, in addition, for example, *Herrmann v. Germany* App no 9300/07 (ECtHR, 26 June 2012).

<sup>65</sup> Emilios Christodoulidis and Scott Veitch 'The ignominy of unredeemed politics: Revolutionary speech as *différend*' (1997) 10(2) *International Journal for the Semiotics of Law* 149, 147–149. Emphasis original.

<sup>66</sup> *Ibid* 143, 154.

– and therefore outside of the scope of freedom of expression – is not unequivocal, but a result of active meaning making. As Celikates observes, ‘describing an event, activity, person or group as “violent”, far from being a neutral observation, is always also a politically charged speech act that can reproduce forms of marginalisation [...]’.<sup>67</sup> Thus, the legal categorisations are not confined to the legal sphere, nor are they detached from general language usage.

The method adopted both in *Disobedient subjects* and *Rebels without a cause* is close reading of the case material. The analysis is not doctrinal in that it does not make normative claims concerning the correct interpretation of the positive law. Rather, my analysis progressed in what can be described as a hermeneutical circle. I approached the material with certain questions in mind. For example, how does the Court approach acts of symbolic disobedience? Furthermore, how does it position the law in relation to the individual’s moral claims on the one hand, and the interests of the state on the other? These questions developed during the initial reading of the cases as I began to understand how they were related to the larger contexts of Turkish citizen subjectivity and the building of the nation state as well as how meaning making steers the course of legal argumentation. This led to my asking different questions, including how does the Court implicitly define religion, and how this definition affects the course of legal argumentation (*Disobedient subjects*); how does the Court reproduce the dichotomy of personal/political, and how does this dichotomising affect the potential of social protests (*Rebels without a cause*)?

My interpretation of the cases is contextual. I interpret the struggle between the applicant, who challenges the prevailing interpretation of the Turkish citizen subject, and the response by the Turkish government, in the historical, social, and political context of the nation-building process of modern Turkey. Understanding the context is important not only for understanding the logic of the parties’ arguments, but also for the Court’s arguments. The Court allows contextual elements into its

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<sup>67</sup> Robin Celikates, ‘Democratizing civil disobedience’ (2016) 42(10) *Philosophy & Social Criticism* 982, 984.



argumentation in at least two ways. Firstly, the margin of appreciation doctrine grants the member states the right to interpret the Convention obligation in relation to their respective circumstances. Secondly, the path for the legal argument is paved by the meaning the Court inserts e.g. into the headscarf or conscientious objection.

The philosophical debate over civil disobedience and conscientious objection does not have a place in legal argumentation, but how civil disobedience is regarded as public and political and conscientious objection as private and personal in many theories, is reflected in how the law deals with acts of disobedience. My argument in *Rebels without a cause* is that the political challenge the objectors pose to their society is in legal proceedings transformed into a question of the personal right to freedom of religion and belief. The reason the Court (dis)misses the political dimension of conscientious objection may be related to its inability or unwillingness to recognise the symbolic element of conscientious objection. Conscientious objectors do not only invoke their personal right to freedom of thought, but they may also wish to contest the militaristic foundations of a nation state, the glorification of killing and dying in the name of the nation, which are ideals embedded in the ideal citizen subjectivity.

It is interesting that the Court's argumentation strategy in the Islamic headscarf cases is completely opposite to the argumentation used in the cases of conscientious objection to military service. In the headscarf cases, the Court chooses to emphasise the headscarf as a political symbol, whereas it treats conscientious objection as a manifestation of personal belief. It would be perfectly plausible to reverse the two strategies, and regard the headscarf primarily as a manifestation of personal belief, and conscientious objection as a political statement. While the reversal might not have a significant impact on the outcome of the cases, it would compel the Court, and therefore us all, to recognise that the Court's interpretations are neither neutral nor without implications both for the course of legal argumentation, and for our ability to re-imagine our societies.

### 3.1.3 WHO BELONGS? THE TURKISH CITIZEN SUBJECT IN TURMOIL

The third article, *Who belongs*, discusses the attempts to expand and question the prevailing notion of what it means to be a Turkish citizen and its relationship to religion and ethnicity in particular. The emphasis is on the different ways that the citizen subjectivity is constructed both ‘inside’ and ‘outside’ the sphere of law. The article itself served somewhat as a turning point for the research project. Thus far, my analysis had focused on legal cases, and the analytical framework – namely the dichotomies of public/private and the conceptualisation of the headscarf as religious, cultural, or political – was first ‘extracted’ from the cases, and then used to re-interpret the cases in their social, political and historical contexts. In *Who belongs*, my approach turned objects – the court, the cabinet, and the street – into concepts, which allowed me to observe the law from new angles.

The article *Who Belongs* discusses the role of the law in constructing the Turkish citizen subject in three different sites: the courtrooms, cabinets and the streets. The courtroom, the cabinet and the street reflect the idea of separation of power into judiciary, legislative and executive powers. Thus, my analysis can be understood as an inquiry into the role of law in each branch of power. The first site is the home field of law; the second is the political scene where politics transform into law; and the third scene is the one in which law and order are maintained. The law, both as discursive and tangible practices, is present in all the scenes. It is the law that operates in the courtroom, the law that can be used as bargaining chip in the cabinets, and the law that legitimises the use of police force in the streets.

In *Who belongs*, my main question concerns how the law relates to the transforming Turkish citizen subjectivity. In making sense of the law’s role in the subject production process, I utilise Rancière’s concepts of police and politics. For Rancière, politics is a battle over what and who is visible, dissensus over what is political in the first place. The police, on the other hand, is the apparent self-evidence of the established social order. The police is what makes and

maintains the distinctions between visible and invisible, speakable and unspeakable, possible and impossible. Following Rancière, I argue that the law is predominantly situated in the sphere of the police, because the law is a central mode of maintaining the prevailing notion of self-evidence.<sup>68</sup>

Interpreting the events in the courtroom, cabinets and streets within Rancière's framework of police/politics provides an understanding of the dynamics of subjectivation of the Turkish citizen. For the cases pertaining to the dissolving of political parties, the courtroom is a scene for constructing the citizen subject. Until recent years, under the rule of the AKP and president Erdoğan, the constitutional court of Turkey dissolved and banned many political parties who identified themselves in terms of ethnicity or religion. Modern Turkey was built upon the idea of a unified nation, which left little room for ethnic minority identities and public manifestations of religion. The pro-Kurdish parties that have been dissolved by the constitutional court, were deemed to pose a threat to state unity, and the Islamic parties, predecessors of the currently ruling AKP, were identified with totalitarianism. For many years, the constitutional court guarded the ideal of a unified, secular nation. This trend has now come to an end.

The cabinets – the scene of governmental politics – is where the characteristics of the ideal citizen are debated. *Who belongs* addresses the relationship between the ethnic and religious majority and minorities in Turkey, and how a citizen subject is delineated in relation to 'the other'. For years, the so-called Kurdish question has reflected the identity struggles of the Kurds, which has contested the idea of a unified nation. While during this decades-long struggle, there have been many phases of gradual progress and improvement in minority rights, the crux of the matter seems insolvable, as the recognition and institutionalisation of the Kurdish identity would mean eroding the very foundation of the nation.

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<sup>68</sup> Jacques Rancière, *Disagreement: politics and philosophy* (Julie Rose tr, University of Minnesota Press 1999) 36; Jacques Rancière, 'Ten Theses on Politics' (2001) 5(3) *Theory & Event* 1, 21; Jacques Rancière, 'Who is the subject of the rights of man?' (2004) 103 (2–3) *South Atlantic Quarterly* 297, 304; Ari Hirvonen, 'Tasa-arvon demokratia – Jacques Rancière, erimielisyyden ajatteliija' in Kotkas, Toomas and Lindroos-Hovinheimo, Susanna (eds.) *Yhteiskuntateorioiden oikeus* (Tutkijaliitto. Episteme 2010) 327, 356.

Finally, the streets are where the citizens themselves re-establish and contest citizen subjectivity. The demonstrators at Gezi Park in 2013 could not be treated as a unified group, and it was precisely their diversity that threatened the unity of the Turkish people. The massively violent response by the authorities to the Gezi Park protest demonstrates that the state regarded the threat posed to the unified citizen subject to be real and imminent. In *Who belongs*, I argue that for a brief moment, a Rancièrian unpredictable subject walked the streets of Istanbul. This subject was unpredictable in the sense that it did not reproduce the ethnic, religious, or political dividing lines of the Turkish society.

The three sites were selected because they were topical. At the time of writing the article, the role of the Turkish Constitutional Court was changing. While it had been, with the army, an important guardian of the Kemalist legacy on which modern Turkey is founded, its power over deciding the faith of political parties has been stripped by the current government. Furthermore, at the time of writing the article, it became apparent that the Kurdish peace process was not as successful as it initially appeared. Instead of recognising ethnic diversity, it turned into another bloodshed. Moreover, the outburst of protests in Gezi Park in Istanbul were recent, and it is interesting that they appeared to communicate with the global Occupy movement, rather than with the Turkish tradition of protests. In their lack of unity, the protesters challenged the Turkish citizen subjectivity, whilst the government's violent response to the protests illustrated that although some fundamental changes were occurring in the foundation of modern Turkey, in some important ways, the state continued to work with the same logic it always had. For example, despite recent changes in the role of religion in the public sphere in Turkey, ethnic and religious minorities remain excluded from Turkish subjectivity. The Turkish citizen subjectivity continues to be construed primarily along the same old dividing lines of the society. This, I believe, illustrates the point I made earlier pertaining to the discourses of othering that constituted not only 'the other' but 'us' as well. Therefore any attempt to include the excluded can be regarded as a threat for the notion of 'us'.

The observation that in some fundamental ways, the logic by which the Turkish state operates has not changed despite the

decline of the secularity principle. This was affirmed by the way the government handled the coup attempt in the summer of 2016. In the past, the military coups in Turkey have been initiated by the Kemalists, who perceived themselves as guardians of Atatürk's secular legacy. This time, however, it is not clear who or what was behind the coup attempt. President Erdoğan accused a US-based preacher, Fethullah Gülen, for conspiring with the coup; some accused President Erdoğan himself for orchestrating the coup attempt in order to strengthen his own position. In the aftermath of the attempted coup, to fight a 'terrorist network' that was allegedly infiltrating state structures, over 40 000 people were arrested and at least 80 000 were removed from their jobs, including military officials, judges, prosecutors, academics, teachers and journalists. Many newspapers, especially those reporting from the Kurdish southeast, were closed.<sup>69</sup> The so-called Kurdish question had also escalated, as the Turkish government ordered a military attack on separatist Kurds in the southeast.<sup>70</sup>

The first three articles, *Disobedient subjects*, *Rebels without a cause* and *Who belongs*, all relate to the construction of modern Turkish citizen subjectivity ('us'). The Muslim woman wearing the Islamic headscarf, the conscientious objector, the Kurds struggling to be recognised as an ethnic minority, and the Gezi Park protestors, all pose the same question for the law. They challenge the prevailing notion of possible identities and aspire to shift the

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<sup>69</sup> --'Turkish deputy PM: Mass arrests 'largely done' *Al Jazeera* (15 October 2016) <http://www.aljazeera.com/programmes/upfront/2016/10/turkish-deputy-pm-mass-arrests-largely-161014190924037.html> accessed 9 January 2017.

--'Turkey sacks 10,000 civil servants, shuts media outlets' *Al Jazeera* (31 October 2016) <http://www.aljazeera.com/news/2016/10/turkey-sacks-10000-civil-servants-shuts-media-outlets-161030135059539.html> accessed 9 January 2017.

--'Turkey issues warrant for US-based preacher Fethullah Gülen in failed coup' *The Guardian* (4 August 2016)

<<https://www.theguardian.com/world/2016/aug/04/turkey-warrant-fethullah-gulen-failed-july-coup>> accessed 9 January 2017.

Constanze Letsch, 'Turkey's post-coup crackdown – in figures' *The Guardian* (19 August 2016) <<https://www.theguardian.com/world/datablog/2016/aug/19/turkeys-post-coup-crackdown-in-figures>> accessed 9 January 2017.

Maeve Shearlaw, 'Turkish journalists face abuse and threats online as trolls step up attacks' *The Guardian* (1 November 2016) <<https://www.theguardian.com/world/2016/nov/01/turkish-journalists-face-abuse-threats-online-trolls-attacks>> accessed 9 January 2017.

<sup>70</sup> Kiran Nazish, 'Cizre in ruins as Turkey lifts curfew on Kurdish towns' *Al Jazeera* (13 March 2016) <<http://www.aljazeera.com/news/2016/03/cizre-ruins-turkey-lifts-curfew-kurdish-towns-160312113030597.html>> accessed 9 January 2017.

limits of 'us' further in order to include the excluded, or to question the dynamics of inclusion and exclusion in more profound ways.

As the subjectivation of 'us' is entangled with, and in fact inseparable from, the subjectivation of 'the other', it was natural for me to look into the ways the law contributes to othering practices. This was perhaps another turning point for this research project. I could have chosen to analyse how the law allows the subjectivities to be contested and reinforces the disobedient's pursuit. Instead, I chose to investigate what our production and treatment of 'the other' tells about 'us'.

## **3.2 THE OTHER**

### **3.2.1 THE DETAINEE, THE PRISONER, AND THE REFUGEE. THE DYNAMICS OF VIOLENT SUBJECT PRODUCTION**

In the fourth article, *The detainee, the prisoner, and the refugee*, I analyse the dynamics of subject production at the Guantanamo Bay detention center, the maximum-security (supermax) prisons in the US, and the European refugee camps. My objective is to explore the ways in which reduced legal subjectivities that are vulnerable to violence and exploitation are produced and resisted in these sites. The analysis is based on secondary sources that range from newspaper articles to activist sources, from the reports of human rights institutions, such as Amnesty International and Human Rights Watch, to UN documents and reports, government reports and other official documents. Writing the article was a long and complicated process. It was a challenge to grasp the dynamics between the law and different forms of resistance that occurred in the three sites. In fact, the sites selected for analysis were initially different. As mentioned previously, I became interested in hunger striking as resistance in the context of Turkey and the Turkish equivalent to the supermax, namely the F-type prison. However, the focus of the article eventually shifted to the US and Europe. In

addition, as I decided to concentrate on the present, despite the relevance for subjectivation and resistance, the long history of hunger strikes by the suffragettes, Irish Republicans, and Gandhi, to name only a few, were beyond the scope of the article.

The case that initially made me interested in hunger striking was the ECtHR case of *Saygılı and Falakaoğlu v. Turkey (2)*, as hunger striking was identified as a *violent* method of protest. My line of questioning was that if hunger striking could be conceptualised as violent, then why not also consider the practices to which the hunger strikers were subjected to be violent? What would become visible if the so-called enhanced interrogation techniques, solitary confinement of prisoners, and even institutional indifference for the basic needs of the refugees were placed on the continuum of violent practices – conceptualised as torture? Here torture does not correspond to any legal definition. Instead, it is used to describe violent subject production techniques that aim to destroy ‘the victim’s world as they know it’,<sup>71</sup> and to produce less-than-human subjectivities in which the legitimization of violence inheres. Quoting Cover, I explain that the martyr – the hunger striker – on the other hand, ‘insists in the overwhelming force that if there is to be continuing life, it will not be in terms of the tyrant’s law’ and that the hunger striker refuses to assume the less-than-human subjectivity reserved for them.<sup>72</sup>

The position that subjectivities are produced not only discursively but also in violent (physical) practices, reiterates the point of social constructionism that not only words but e.g. objects and gestures can be used for communication and conveying meaning. Non-discursive violence is therefore a powerful way to communicate the victims’ unimportance and inferiority. I contend

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<sup>71</sup> Robert M. Cover, ‘Violence and the Word’ (1986) 95 *Yale L J* 1601, 1603. Another example of the different ways in which social reality is created with words is my using the word ‘torture’ to describe the techniques of violent subject production, instead of using it as a legal category. The legal concept of torture is not only descriptive but also prescriptive (as is any other use of the word). The law claims ownership over words, and hence phenomena, by imposing the legal definition of words beyond the legal sphere. To provide two more examples, consider the words ‘rape’ and ‘racist’. Both words have their own respective legal meanings (which, of course, are indefinite and subject to constant legal debate). However, both words can also be used irrespective of their legal definitions to capture our lived experiences. It is important that the legal understanding of words does not override this possibility.

<sup>72</sup> Robert M. Cover, ‘Violence and the Word’ (1986) 95 *Yale L J* 1604–1605.

that the violent practices that the detainee, the prisoner, and the refugees are subjected to, effectively communicate their inferiority and justify their discrimination as well as further violence against them.

Along with hunger striking, the use of law as a means of resistance is discussed in the article. Some of the torture practices have been successfully contested in courts. For example, the European Court of Human Rights has acknowledged the inability of Greece to ensure adequate living conditions and appropriate asylum procedure in the case of *M.S.S. v. Belgium and Greece*.<sup>73</sup> In *Ashker v. Brown*,<sup>74</sup> the Center for Constitutional Rights successfully challenged the use of prolonged solitary confinement in supermax prisons, and the Guantanamo Bay detainees have been able to establish the jurisdiction of the US courts over the detention centre and rights to due process in several cases.<sup>75</sup> However, the main premise throughout the article is that the violent subject production techniques have not fundamentally changed despite some success in the courtrooms. Indeed, many of the refugees in Europe continue to live in poor conditions in tent camps and without effective access to justice. Many Guantanamo detainees also continue to be held in indefinite detention despite being cleared for release. Furthermore, solitary confinement is still frequently used in Californian prisons, and the new 'behaviour based' step-down policy that replaces the debriefing process is fundamentally the same as its predecessor.

I conclude that while legal channels may provide ways to contest some aspects of the violent practices, they are not well suited for challenging the reduced subjectivities reserved for the detainee, the prisoner and the refugee. It seems as if the othering practices of law can be challenged by legal means, but not the othering logic behind them. The Guantanamo Bay detainees, even when released, are not able to rid themselves of the danger associated with them, and by

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<sup>73</sup> *M.S.S. v. Belgium and Greece* ECHR 2011. Returning refugees back to Greece is, however, again possible, see Harriet Agerholm, 'EU says member states can begin deporting refugees and migrants back to Greece from March' *Independent* (8 December 2016) <<http://www.independent.co.uk/news/world/europe/europe-refugees-migrants-greece-march-a7462921.html>> accessed 9 January 2017.

<sup>74</sup> *Ashker v. Governor of California* No. 4:09-cv-05796-CW (N.D. California, 2012).

<sup>75</sup> See e.g. *Rasul v. Bush* No. 03-334, June 28, 2004; *Hamdi v. Rumsfeld* No. 03-6696, June 28, 2004; *Hamdan v. Rumsfeld* No. 05-184, June 29, 2006; *Boumediene v. Bush* No. 06-1195, June 12, 2008.



definition, supermax prisoners pose a threat to the general prison population, the prison staff, and to society. Likewise, the refugee is increasingly regarded as posing a threat to the West, not only as a potential terrorist, but also as a threat to the culture, values, and to the 'Western way of life'.

What possibilities does the detainee, the prisoner, or the refugee have to challenge violent subjectivation? The resistance strategies adopted by 'the other' in order to challenge not only their treatment, but their subjectivation as a dangerous subject with a reduced legal protection, assumes forms that do not 'speak law', such as hunger striking. My position is that the hunger striker is able to reveal the law's violence in a way that is not possible by recouring to legal remedies. Hunger strikes may not have been highly effective in directly challenging violent practices, but their symbolic power is recognised by the state, judging by its forceful response to hunger striking. I argue that the hunger strikers, the *martyrs*, are able to deconstruct the reduced subjectivity appointed to them in the violent practices, and they force the law to face its own violence. Hunger striking calls out the law on its hypocrisy. The law simultaneously, on the one hand, declares the universality of human rights and provides legal remedies, and on the other, allows ongoing indefinite detention, favours the rights of the citizens, discursively maneuvers the perception of solitary confinement not as a punishment, but as a security measure, and effectively blocks access to justice.

### 3.2.2 FOREVER AGAIN: HOW DISCURSIVE STRATEGIES RE-LEGITIMATE TORTURE IN THE US SENATE SELECT COMMITTEE'S 'TORTURE REPORT' AND THE CIA'S RESPONSE

According to Foucault, 'discourses are 'practices that systematically form the objects of which they speak'.<sup>76</sup> The fifth and final article addresses how less-than-human subjects are discursively produced. The subjectivities created in language have very tangible implications as the knowledge we produce about 'the other' profoundly affects the way we think we can treat them because what is possible to do to another person is affected by the version of 'truth' we create.<sup>77</sup>

*Forever Again* offers an analysis of two official documents to reveal their deflection of responsibility for torture. The first document is the executive summary of the report on the CIA's use of the so called enhanced interrogation techniques, based on an investigation conducted by the US Senate Select Committee on Intelligence (SSCI, the Committee) from 2009 to 2013. The actual report, apart from the summary, remains classified. The second document is the CIA's response to that report. The Committee's main findings were that these enhanced interrogation techniques were ineffective in obtaining 'actionable intelligence', the CIA had misled the other officials, and that the Rendition, Detention and Interrogation Program had been overall counterproductive to national interests. The CIA, however, insisted that despite some shortcomings, this programme had been successful in acquiring important information for preventing terrorist attacks, and that the information provided by the CIA to other officials had been overall accurate.

In *Forever again*, I demonstrate that the problem identified by the report is ultimately not the use of the so called enhanced techniques, but the CIA's disloyalty towards other state officials. The CIA, in turn, insists that it simply followed both the law and the

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<sup>76</sup> Michel Foucault, *The archaeology of knowledge* (Social science paperbacks; World of man, Tavistock, Routledge 1974) 49; see also Vivien Burr, *Social constructionism* (3rd edn Routledge 2015) 64.

<sup>77</sup> Ibid. See also Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press, 2013) 33.

policies that were approved by the Department of Justice's Office of Legal Counsel. Both the report and response silence the question of torture. As I argue in the article, torture is simultaneously absolutely prohibited and yet lawfully practiced. In principle, the issue of torture is a simple one: the question of whether or not torture is legal in some circumstances is completely irrelevant for the law. In practice, utilitarian and pragmatic arguments justify torture practices.

The analysed material in *Forever again* is not a product of a legal process, nor does it have direct legal implications. The question is why would it be important to discuss that material in the context of the law? As explained earlier, my approach to the law does not fall within the parameters of what Douzinas and Gearey refer to as restricted jurisprudence, which assumes that the sphere of law can be mapped and marked according to certain markers and includes only certain institutions, practices and actors. Instead, approaching the law as a discourse, I look into the ways in which law is used as a discursive resource in the texts. Despite their peripheral role in the investigation, it was evident that law and legality played a central part in the report. Further questions arose from the following observation: if the aim of the investigation was not to discuss the legalities of these so called enhanced interrogation techniques, why was it emphasised throughout the report and particularly in the CIA's response that the use of the techniques was not illegal? If the prohibition of torture is without exception, why was such extensive explaining required on issues related to the enhanced techniques?

The work of Scott Veitch, Stanley Cohen, and Sten Hansson provided me with an orientation that enabled me to begin to untangle these questions. Veitch's notion of the law's irresponsibility explains how the law and legal institutions are central to organising irresponsibility along with responsibility. One aspect of the way that law seeps outside of the 'legal' is that it has become the ultimate trump card in ethical debates. In other words, the law equals good, or at least acceptable. Quoting Veitch, I argue that the legal practices, categories and concepts do not confine themselves to the legal sphere, but instead also guide our perception of harm and responsibility outside of it. Our manner of

thinking and talking about responsibility is influenced by the legal.<sup>78</sup>

The detailed analysis of the report and the CIA's response is conducted within a framework that is based on the work by Cohen, Hansson and other discourse theorists. These scholars address different discursive strategies for blame-avoidance.<sup>79</sup> The method of analysis used in *Forever again* developed gradually. Firstly, I read the Committee report and CIA's response with a few questions in mind. I was interested in what the report and the response said about torture, what stance they adopted in relation to their so-called enhanced interrogation techniques, what the major findings were and how they were addressed as well as how the CIA responded to the critique. Based on the work of Cohen and Hansson, I began to code the material to determine the types of blame-avoidance strategies that were used in the material, and to ascertain where the impression of irresponsibility originated from. I used different colours to mark the different discursive tactics that I discovered in the texts. Firstly, I marked points in the report and the response that concerned the following: responsibility and agency, lawfulness and efficacy of the enhanced techniques, explanations for the use of such techniques, descriptions of the decision-making process, and points where the CIA expressed agreement or disagreement with the claims of the report. I continued by marking the points in the report and the response where different blame-avoidance techniques were used, such as limiting responsibility spatially and temporally, justifying, dissociating cause and consequence, evading and blurring the question of responsibility, denying, silencing, relativising, impersonalising, etc. In addition, I searched and marked the documents for code words, such as 'torture' to determine the types of contexts in which those words were used.

Coding made it possible to recognise recurring patterns of responsibility avoidance, and to outline the two topoi that emerged

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<sup>78</sup> Scott Veitch, *Law and irresponsibility: on the legitimation of human suffering* (Routledge-Cavendish 2007) 84–92.

<sup>79</sup> Stanley Cohen, *States of denial: knowing about atrocities and suffering* (Polity 2001) xvi, 344; Stanley Cohen, 'Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims' (1996) 18(3) *Hum Rights Q* 517; Sten Hansson, 'Discursive strategies of blame avoidance in government: A framework for analysis' (2015) 26(3) *Discourse & Society* 297.

from the texts: the topos of law and the topos of threat. By topos, I refer to the basis for justification (the ultimate justification) and the internal logic of argumentation. The topos of law bases justification on legality and the authority of the law, (if it is legal, it is acceptable), while the topos of threat reflects everything ultimately to security and necessity. In the topos of law, the basis for evaluation is authority, while in the topos of threat, it is security; in the topos of law, the basis of justification is legality, while in the topos of threat, it is necessity; and in the topos of law, the main discursive strategy is legitimisation, while in the topos of threat, it is rationalisation.<sup>80</sup>

Within this analytical framework, I was able to make visible the strategies that were used in the report and in the response to alter the perception of the self ('us'), harm, and 'the other'. *Forever again* relates to the theme of subjectivity in that it offers a glimpse into the ways in which the violent practices discussed in *The detainee, the prisoner, and the refugee* are justified and excused using the legal understanding of what constitutes responsibility. The discursive responsibility avoidance for the use of the so-called enhanced interrogation techniques, and their implicit justification is explained by the curious entanglement of the topos of law and the topos of threat. The discursive strategies for relativising torture are identified as the merging of the topos of law and the topos of threat – the equation of legality, efficacy and necessity.

Within the narrative of 'us', 'we' are often sincere, law abiding and even heroic. One version of that narrative is unfolded in *Forever again*. In its report addressing the use of the enhanced interrogation techniques, the Senate Select Committee for Intelligence points out certain serious problems with the CIA's conduct within the Rendition, Detention and Interrogation Program. However, analysed together with the CIA's response to the report's allegations, an othering narrative can be reconstructed – one in which the fundamentalist Muslim terrorist threatens the

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<sup>80</sup> Both topoi can occur within the law: being here called the topos of law does not indicate that this is *the* topos of law, other topoi being 'foreign' in law. Instead it simply means that within this topos, the argumentation is based on legality, legitimacy, and the authority of the law. The law as a whole, on the other hand, can and does draw e.g. from the topos of threat, giving the arguments of security and necessity legal weight. Cf. Samuli Hurri, *Birth of the European individual: law, security, economy* (Routledge, 2014) 233.

lives of innocent, white people as well as their way of life. In this story, resorting to 'unconventional means' in 'war on terrorism' is justified by necessity. Suddenly, it becomes possible to simultaneously prohibit and legitimate the use of torture.

### 3.3 SUBJECTIVATION AND OTHERING IN LAW

The overall conclusions of this thesis are that the law both produces the subjectivities of 'us' and its 'others' in discursive and other social practices, and that the fragmentation of the human subject in law legitimates violence against 'the other'. These conclusions are not completely novel or ground-breaking in themselves, and rather than in them, the value of this research lies in making visible the process that results in the totalization of the citizen subject, fragmentation of the human subject and legitimation of violence. In general, social constructionist approach is interested in process and not a product, the aim being '[inquiring] into the methods of social construction'.<sup>81</sup> Therefore the findings presented in the articles answer *how*-questions: How is the citizen subject produced? How is disobedience thwarted in legal decision making? How is the less-than-human subject produced? How is torture legitimated?

The research methods are based on the theoretical framework of social constructionism and the idea of law as a social construction in order to capture the workings of the law both inside and outside the judicial practices. The research progressed, as described above, in hermeneutic circles. The initial reading of the research material resulted in an observation that the law (re)produces 'us' and 'the other'. The analysis then proceeded to the *how*-questions and observing the discursive and other practices (re)producing 'us' and 'the other' in law, and concluded that in the research material subjectivation and othering happen through politicization of the Islamic headscarf, deflecting political protests, guarding the borders

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<sup>81</sup> Lester F. Ward (1905) as quoted in Joel Best, 'Historical Development and Defining Issues of Constructionist Inquiry' in James A. Holstein & Jaber F. Gubrium (eds.) *Handbook of Constructionist Research* (Guilford Press 2008) 41.

of ‘the people’, creating subjectivities with lessened protection, and by merging the topoi of law and threat.

All the articles discussed above address the issues of the law, subjectivation, and disobedience. In the following section, I draw some general conclusions from these three themes, and pursue the discussion further by reconstructing three narratives. The first sub-section deliberates on the law as a story we tell ourselves about ourselves. The second sub-section addresses the fragmentation of the human subject in law and the implication this has in legitimating violence against vulnerable groups. Subjectivity is also examined from the perspective of disobedience. The final sub-section continues with the theories of civil disobedience and inquires as to what role the theories have in producing the narrative of ‘us’ as democratic, liberal, and rational. The articles follow these final remarks. The articles are, of course, independent and can be read separately. However, my intention is that this introduction and especially the following section provides the reader with additional perspectives on the explicit arguments presented in the articles, and enables them to be read as a continuous story.





## 4. THE STORIES WE TELL OURSELVES

### 4.1. NARRATIVE APPROACH

*From politics to advertising, the story makes believe and by that it makes do, it takes up this and neglects that, it classifies. On the other hand it produces oblivion, it institutes silence on the things it does not talk about. And because it is always 'full' and closed, it makes even forget that it is withholding something.<sup>82</sup>*

Over the past few decades, narrativity has been used in social research to understand the relationships between individuals and groups, and the dynamics of the social, political and historical dimensions of the social world. 'Narrative' refers here to both a method of inquiry and a story under research.<sup>83</sup> The term narrative is used in the following three sections in the latter sense, as I discuss and further develop the themes arising from the five articles the law, the subject, and disobedience. A narrative as a story can be understood as a representation of the 'transformation of state of affairs' that 'do not simply recount happenings: they give them shape, give them a point, argue their import, proclaim their result'.<sup>84</sup> In other words, a narrative is a 'plot summary', a re-telling of something that happened and, at the same time, constructing that something.<sup>85</sup> This definition allows narratives to be written, oral, sign language, pictures, gestures, or any combination of these,

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<sup>82</sup> Michel de Certeau 1978 as cited in Wolfgang Kraus, 'The Narrative negotiation of identity and belonging' (2006) 16(1) *Narrative Inquiry* 106.

<sup>83</sup> Ivor F. Goodson and Scherto R. Gill, 'The Narrative Turn in Social Research' (2011) *Counterpoints* 386, 18, 20–22; Barbara Johnstone, 'Discourse analysis and narrative' in Deborah Schiffrin, Deborah Tannen, and Heidi E. Hamilton (eds.) *The handbook of discourse analysis* (Blackwell 2001) 639.

<sup>84</sup> See Gerald Prince, 'On Postcolonial Narratology' in James Phelan and Peter J. Rabinowitz (eds.) *A Companion to Narrative Theory* (Blackwell 2005) 373.

<sup>85</sup> Peter Brooks, 'Narrative in and of the Law' in James Phelan and Peter J. Rabinowitz (eds.) *A Companion to Narrative Theory* (Blackwell 2005) 415, 419.

and it does not presume their falsehood, factuality or fictionality.<sup>86</sup> Contemporary approaches to narratives do not take the narrative (as a story) at face value, but 'generally insist on the idea that a narrative constructs a version of events rather than [describe] them in their true state'<sup>87</sup> so that a narrative, is therefore performative. In addition, the contemporary approaches view binary oppositions as 'an unstable basis for meaning and as a place where the values and hidden ideologies of a text are inscribed'.<sup>88</sup> Nevertheless, storytelling remains an important means of constructing social bonds and collective identities.<sup>89</sup> It is therefore important to remain both aware and critical of the stories we tell ourselves about ourselves, and the binaries we construct with our words.

The deconstructivist movement in narratology challenges the idea of a narrative as a stable and coherent structure, and thus emphasises the constructedness of narratives as objects of research. At this point, it is appropriate to reiterate that the story I tell is my own construction about the stories we tell ourselves.<sup>90</sup> It is not my intention to replace any other narrative with an improved version of the course of events, as my aim is simply to offer an alternative insight into the various ways 'we' are constructed. The object of this research is not, after all, 'the other'. Thus, I do not attempt to replace the othering perceptions with something else, something that would capture the 'real', or to include the excluded. Instead, I examine the way 'we' represent and reproduce the dichotomy us/the other. Even when discussing 'the other', this is a book about 'us'. Of course, unraveling one part of the dichotomy unravels the dichotomy itself, allowing us to see that 'the other' is simply the difference marking 'our' identity.<sup>91</sup>

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<sup>86</sup> Gerald Prince, 'On Postcolonial Narratology' in James Phelan and Peter J. Rabinowitz (eds), *A Companion to Narrative Theory* (Blackwell 2005) 373.

<sup>87</sup> Mark Currie, *Postmodern Narrative Theory* (Macmillan Press: St. Martin's Press 1998) 118.

<sup>88</sup> Ibid 5; see also Wolfgang Kraus, 'The Narrative negotiation of identity and belonging' (2006) 16(1) *Narrative Inquiry* 105.

<sup>89</sup> Wolfgang Kraus, 'The Narrative negotiation of identity and belonging' (2006) 16(1) *Narrative Inquiry* 109.

<sup>90</sup> See e.g. ibid 105; Mark Currie, *Postmodern Narrative Theory* (Macmillan Press: St. Martin's Press 1998) 48.

<sup>91</sup> See e.g. Mark Currie, *Postmodern Narrative Theory* (Macmillan Press: St. Martin's Press 1998) 17; Wolfgang Kraus, 'The Narrative negotiation of identity and belonging' (2006) 16(1) *Narrative Inquiry* 104–105; Chris Weedon, *Identity and Culture: Narratives of Difference and Belonging* (Open University Press 2004) 3–4, 19.

Section 4.2 focuses on the stories we tell ourselves through the law and about law. My main objective is to problematise the law as a source of responsibility and justice and reveal the ways in which the law is incapable of rectifying its' own violence. In other words, I address the difficulties that the legal notion of responsibility poses for recognising the myriad ways that responsibility is effaced in the law and through it. As I will demonstrate, part of the law's irresponsibility results from how the 'inside' and 'outside' of the law are created.

The critical approaches to subjectivity have revealed that the legal subject is not the colourless and genderless subject it claims to be, and furthermore, that the narrative of 'our' law as objective and neutral is fictitious. Feminist scholars have asserted that the legal subject is, implicitly, male, white, able-bodied, autonomous, rational, educated and self-interested.<sup>92</sup> In addition to the implicit assumptions regarding the legal subject, the law defines its subject in explicit ways, as discussed in *Disobedient subjects* and *The detainee, the prisoner, and the refugee*. In section 4.3, my aim is to contribute to the problematisation of the legal subject. I provide evidence that the apparently unified subject of law is actually fragmented, and observe the ways in which this fragmentation takes place. In the context of my analysis, this fragmentation legitimises violence and discrimination by creating less-than-human subjectivities in which the legitimisation of violence inheres. In other contexts, however, some type of in-betweenness may provide opportunities to challenge the law's dichotomies. One example of this is the struggle for recognition for transgender identities and the problematisation of the gender dichotomy. Thus, the process of fragmentation can also work in favour of recognition in law. Nonetheless, this can only be achieved if the process of fragmentation is transparent. The problem of fragmentation in the examples mentioned in this thesis is that it is invisible, and this makes it impossible to challenge by using the language of the law. An even more fundamental problem is that what is fragmented in my examples is the human subject itself. Hannah Arendt has famously stated that the right to have rights is, in our present time,

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<sup>92</sup> Ngairé Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*. (Allen & Unwin, 1990) 52, 53.

ultimately a 'right of every individual to belonging to humanity' and 'should be guaranteed by humanity itself'. Arendt also states that 'it is by no means certain whether this is possible'.<sup>93</sup> Indeed, it seems as if it is a constant struggle to include everyone in the notion of humanity.

Section 4.4 presents my argument that the theories of civil disobedience, whose aim is usually to map the limits of acceptable disobedience in a democratic society, may result in appropriating the struggle of 'the other' into 'our' narrative of 'us' as democratic, progressive, and liberal. This does not imply that the subaltern does not, or could not, belong to the notion of 'us'. Instead, it means that their struggle for recognition and belonging is silenced and narrated as a phase in 'our' history. Often it also means that the historical violence and discrimination against the subaltern and the ways they bleed into the present is made invisible. My argument is that the theories of civil disobedience can be understood as reproducing a historical narrative in which the past is told as a coherent, progressive story and in which the persisting dichotomy of us/the other is rendered invisible in order to preserve unified national identity as well as the illusion of an inclusive democracy. The first step is to analyse the theories of civil disobedience as narratives.

In the following three sections, my aim is to demonstrate how the common themes of the five articles are connected. Admittedly, reconstructing the common themes means that much of the contents of the articles is omitted. The discussion on the law, subject, and disobedience does not directly reiterate the arguments made in the articles, but rather develop them further in an independent manner and sketch directions for future research.

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<sup>93</sup> Hannah Arendt, *The Origins of Totalitarianism* (The World Publishing company 1961) 298.

## 4.2 THE LAW

*'I cannot accept you giving reasons which have no relevance to the case.'*<sup>94</sup>

The difficulty in challenging the othering discourses is that for us, the stories we tell ourselves about ourselves seem unequivocal, natural, and true. Critical race theorists illustrate this difficulty by telling two different stories about slavery in the US.<sup>95</sup> According to the dominant storyline, slavery was something terrible that happened in the past. Slavery ended with the American Civil War, but discrimination against the blacks persisted. As people became increasingly aware and sensitive to the plight of the blacks, federal statutes and case law gradually eliminated discriminatory practices. The gap between blacks and whites continues to exist today, but it is steadily closing. A few decades ago, it would have been impossible for a black man to become the president of the US, but even this changed in 2008. Admittedly, as the story goes, racism has not been erased completely, but it predominately exists at the individual level and can be resolved with better legislation and sanctioning racist practices.<sup>96</sup>

It is interesting to note that the narrative approach was introduced to legal scholarship through the alternative or oppositional narratives that call attention to the stories of those marginalised and excluded by legal thinking and procedure.<sup>97</sup> As Bell remarks, a very different and equally true story can be told from the same facts – one 'filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily

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<sup>94</sup> Judge of the Bader-Meinhof trial, 5/8/75 as cited in Emiliios Christodoulidis and Scott Veitch, 'The Ignominy of Unredeemed Politics: Revolutionary Speech as Différend' (1997) 10(29) *International Journal for the Semiotics of Law* 142.

<sup>95</sup> Richard Delgado and Jean Stefancic, *Critical race theory: an introduction* (Critical America, 2nd edn New York University Press 2012) 40–43.

<sup>96</sup> Ibid 40, 41

<sup>97</sup> Peter Brooks, 'Narrative in and of the Law' in James Phelan and Peter J. Rabinowitz (eds.) *A Companion to Narrative Theory* (Blackwell 2005) 415

comprehend'.<sup>98</sup> This story does not have a happy ending, but an ending that acknowledges the far-reaching consequences of slavery and racism to the present day, visible in factors such as the higher infant death rates among minorities, school dropout rates, income gaps, life expectancy, assets and educational attainment.<sup>99</sup> Moreover, the progress we do observe is not necessarily a result of increasing sympathy and evolving standards of decency and conscience, but instead stems from factors such as the need to improve the state's reputation and maintain its international power position.<sup>100</sup>

The story about the law that I choose to tell in this thesis is perhaps rather pessimistic. The same research material could be interpreted very differently and other aspects, such as the emancipatory side of law could be highlighted. However, my aim is different. I wanted to challenge myself to examine closely the traces of law in the society and to hold the law responsible for what it does. This approach derives from scholars such as Scott Veitch, Robert M. Cover, Colin Dayan and Costas Douzinas, who all address the violence, the irresponsibility, and the false neutrality of the law. My aim in this thesis is not to replace one story with another, one definition of law with another or a problematic idea of the legal subject with a better, more inclusive one. Instead, I attempt to determine what becomes visible if the law is constructed as something that *does* instead of something that *is*. This approach does not coincide perfectly with the 'law in books / law in action' approach, as my understanding of the law exceeds what the legal realists would usually consider to be law.<sup>101</sup> I am interested in all the ways the law works in judicial, legislative, and administrative

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<sup>98</sup> Derrick Bell, *And we are not saved: the elusive quest for racial justice* (Basic Books 1989) 217.

<sup>99</sup> Ibid; Richard Delgado and Jean Stefancic, *Critical race theory: an introduction* (Critical America, 2nd ed edn New York University Press 2012) 41, 46–47; Henry Kamerling, 'Assimilation, Exclusion, and the End of Punishment' in Austin Sarat (ed.) *Crime and Punishment: Perspectives from the Humanities* (JAI Press Inc 2005) 191.

<sup>100</sup> Derrick Bell, 'Brown v. Board of Education and the Interest Convergence Dilemma' (1980) 93 *Harvard Law Review* 518; Richard Delgado and Jean Stefancic, *Critical race theory: an introduction* (Critical America, 2nd ed edn New York University Press 2012) 41. See also George Lipsitz, 'Civil Rights and White Identity Politics' in Austin Sarat and Thomas R. Kearns (eds.) *Cultural Pluralism, Identity Politics, and the Law* (University of Michigan Press 1999) 111–138; Patricia Williams, *The Alchemy of Race and Rights. Diary of a law professor* (Harvard University Press 1991).

<sup>101</sup> See Robert M. Cover. 'Nomos and Narrative' (1983) 97 (4) *Harv L Rev.* 4, 7.

practices, as well as a discourse that is not limited to the legal home field.

Why do I approach the law with such a broad brush and insist that it is, in fact, the law that acts outside the institutional legal settings? My argument is that if the law is understood as a discourse rather than a doctrine, an institution, a system, or something similar, then the otherwise invisible can be seen. My aim has been to uncover how the ways of legal thinking – inside and outside the ‘legal’ – shape our subjectivities, and in some cases, allow and even justify violent practices. Maintaining the dichotomy of the inside/outside of the law is useful for doctrinal research and necessary for the judicial practices. However, this dichotomy should not be taken for granted as something that is ‘real’. The reverse side of this necessary fiction is that the law is then absolved from the responsibility of its consequences that, to me, it should not be allowed to disown.

The inside/outside divide is not only being constructed between the law and non-law, but also within ‘inside’ the law.<sup>102</sup> Criminal law, for instance, is often acknowledged as the most invasive and violent branch of law – and it is therefore considered important to define and restrict the scope of criminal law. Although it is perfectly plausible to ask whether the criminal law is the most invasive branch of law, given the intrusive nature of cases such as custody issues and deportations, the idea itself has resulted in some artificial practices that blur what actually occurs within the legal. Borrowing Dayan’s example, solitary confinement, while the practice itself and its detrimental effects on the human psyche remain unaltered, is regarded differently by the US courts depending on whether it is deemed a punishment or an administrative measure.<sup>103</sup> It is as if ‘punishment’ would somehow be essentially different from an administrative measure, despite the practice and its effects being identical, merely because the intent behind the practices is allegedly different.<sup>104</sup>

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<sup>102</sup> See Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2013) 75.

<sup>103</sup> Ibid 81.

<sup>104</sup> Ibid; see also Costas Douzinas and Adam Gearey, *Critical jurisprudence: the political philosophy of justice* (Hart Publishing 2005) 11–12. Generally speaking, intent plays a crucial role in assigning legal responsibility, as explained by both Dayan and Veitch. Emphasising the intent of the one who inflicts the pain effaces the suffering that is

In my articles, I discuss both how the law works within the ‘legal’ and how it extends its consequences beyond it. I would like to present two more examples of how the law works outside the legal sphere: the law’s irreversible effects that cannot be undone in the judicial review, and the potential chilling effect of criminalisation. An extreme example of the irreparable effects of law is the ruined lives of the Guantanamo Bay detainees. As discussed in *The detainee, the prisoner, and the refugee*, many detainees continue to be held at Guantanamo, despite having been cleared for release. Those who have been released have no access to their former life as they knew it. Some former detainees are not even allowed to return to their home countries. For instance, Tunisian Lutfi Bin Ali, who spent 13 years at Guantanamo, is currently living in Kazakhstan in a remote northern town. Bin Ali was initially supposed to integrate into the Kazakh society within a two-year rehabilitation programme for former Guantanamo detainees, financed by the International Committee of the Red Cross. Bin Ali’s reality, however, proved to be very different, and he is still prohibited from leaving his new hometown. Practically, he is as isolated now as he ever was in detention.<sup>105</sup> The detainees’ encounters with the law are not limited to their struggles with questions of jurisdiction, due process, humane living conditions and protection from torture, but continue even after their release. The capacity of the law to rectify its own repercussions is usually limited to either monetary or symbolic compensations. In the case of former Guantanamo detainees, neither is guaranteed.

The chilling effect of legal proceedings and criminal investigations is a well-known phenomenon. A topical example that resonates with the themes of this thesis is Australia’s offshore

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caused. Thus, cruelty is not measured by the ‘pain and suffering inflicted, but by the intent of the person who inflicts them’. Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2013) 186, 187, 198. The flip side of requiring the establishment of intention, which is the ‘pride of modern criminal law’, is that ‘particularly in the case of large-scale commissions of harms, its effect is not to make secure responsibilities but rather the opposite: to engender impunity’. Scott Veitch, *Law and irresponsibility: on the legitimation of human suffering* (Routledge-Cavendish 2007) 90, 108, 109.

<sup>105</sup> Shaun Walker, “‘Here I have nobody’: life in a strange country may be worse than Guantánamo” *The Guardian* 30 September 2016) <<https://www.theguardian.com/world/2016/sep/30/worse-than-guantanamo-ex-prisoner-struggles-with-new-life-in-kazakhstan>> accessed 9 January 2016.



detention system and laws restraining publicity regarding the detention centres. Resembling Guantanamo Bay's history as a US detention centre for refugees from Haiti in the 1990s, Australia is using Manus Island and Nauru as an offshore detention centre for refugees predominately from Sri Lanka, Pakistan, Bangladesh and Iraq. Australia's policy of 'offshore processing' was introduced in 2012. Refugees arriving by boat are sent to either Manus Island or Nauru for indefinite detention. Australia has no intention of relocating any of them in its territory, nor are there any other viable resettlement options available.<sup>106</sup> Amnesty International has described the 'offshore processing regime' as explicitly designed to inflict damage on refugees as an act of deterrence, and concluded that the systematic and deliberate neglect and cruelty towards refugees amounts to torture.<sup>107</sup>

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<sup>106</sup> Ben Doherty, 'Refugee camp company in Australia "liable for crimes against humanity"' *The Guardian* (25 July 2016) <<https://www.theguardian.com/australia-news/2016/jul/25/ferrovial-staff-risk-prosecution-for-managing-australian-detention-camps>> accessed 9 January 2016; see also Gareth Hutchens, 'Asylum seekers face life time ban from entering Australia if they arrive by boat' *The Guardian* (30 October 2016) <<https://www.theguardian.com/australia-news/2016/oct/30/asylum-seekers-face-lifetime-ban-on-entering-australia-if-they-arrive-by-boat>> accessed 12 January 2017.

<sup>107</sup> 'Island of Despair. Australia's "Processing" of Refugees on Nauru' *Amnesty International* 2016, available at <[https://uploads.guim.co.uk/2016/10/17/amnesty\\_international\\_island\\_of\\_despair\\_final.pdf](https://uploads.guim.co.uk/2016/10/17/amnesty_international_island_of_despair_final.pdf)> accessed 12 January 2017.

The detention centre at Manus Island has been found illegal and unconstitutional by the PNG Supreme Court in April 2016. After the decision, some minor changes have been made, but the detention regime or detention conditions has largely remained unchanged. Ben Doherty, 'Australia confirms Manus Island immigration detention centre will close' *The Guardian* (17 August 2016) <<https://www.theguardian.com/australia-news/2016/aug/17/manus-island-detention-centre-to-close-australia-and-papua-new-guinea-agree>> accessed 9 January 2017.

Australia does not intend to resettle the refugees in Australia. The plan has been to return the refugees to their countries of origin, resettle some of them in PNG, or recently to the US. Ben Doherty, Helen Davidson and Paul Karp, 'Papua New Guinea court rules detention of asylum seekers on Manus Island illegal' *The Guardian* (25 April 2016) ><https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional>> accessed 9 January 2017; Elaine Pearson, 'Will Australia Really Close the Manus Island Detention Center?' *Human Rights Watch* (18 August 2016) <<https://www.hrw.org/news/2016/08/18/will-australia-really-close-manus-island-detention-center>> accessed 9 January 2017; Paul Farrell, 'Refugees on Nauru and Manus Island to be resettled in US – as it happened' *The Guardian* (13 November 2016) <<https://www.theguardian.com/australia-news/live/2016/nov/13/australia-nauru-manus-island-refugee-detaineeannouncement-live>> accessed 9 January 2017; Kerry Fressard, 'We Are Witnessing The Unravelling Of The Cruel Offshore Detention System' *The Huffington Post* (28 November 2016) <<http://www.huffingtonpost.com.au/kerry-fressard/we-are-witnessing-the-unravelling-of-the-cruel-offshore-detention/>> accessed 9 January 2017.

The role of the law in constituting and maintaining the system is twofold. Firstly, similarly to Guantanamo Bay detention centre for suspected terrorists, the offshore detention centres for refugees in Nauru and Manus Island are legal constructions and not ‘outside the law’. Secondly, the law is used to target whistleblowers and journalists who are trying to publicise the conditions in the refugee camps and pursue a change in Australia’s refugee policy. For example, section 42 of the Border Force Act criminalises ‘unauthorised disclosure’ about the conditions in the offshore refugee camps by anyone working within the immigration detention system. The government has argued that the secrecy clause, which has been contested in the high court, would not result in situations such as doctors being charged for speaking about the conditions at the camps in public. Nevertheless, just by being in force, the law might prevent whistleblowing and other attempts to publicise and publically criticise the detention system.<sup>108</sup> According to the United Nations special rapporteur, Australia has created ‘an atmosphere of fear, censorship and retaliation’.<sup>109</sup> Similar examples of law’s chilling effects can be observed currently in the US, in Native

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<sup>108</sup> Ben Doherty, ‘Immigration detention doctors challenge Border Force Act’s secrecy clause in court’ *The Guardian* (26 July 2016) <<https://www.theguardian.com/australia-news/2016/jul/27/immigration-detention-doctors-challenge-border-force-acts-secrecy-clause-in-court>> accessed 9 January 2017; see also Michael Koziol, ‘“Fear, censorship and retaliation”: United Nations rapporteur slams Australia’s human rights record’ *The Sydney Morning Herald* (18 October 2016) <<http://www.smh.com.au/federal-politics/political-news/fear-censorship-and-retaliation-united-nations-rapporteur-slams-australias-human-rights-record-20161018-gs4tt3.html>> accessed 9 January 2017; see also ‘UN experts urge Tasmania to drop its anti-protest bill’ United Nations Human Rights Office of the High Commissioner, 2014 <<http://un.org.au/files/2014/09/2014-09-10-tasmania-anti-protest-bill.pdf>> accessed 12 January 2017.

Originally, the Tasmanian Protection from Protesters bill proposed fining demonstrators who ‘prevent, hinder, or obstruct the carrying out of a business activity, and included mandatory jail terms up to two years for repeat offenders. After heavy criticism from activists and UN rapporteur, the government decided to amend the bill to not apply to demonstrations on public roads and footpaths, provided that they do not block access to a business, and to cover only ‘industries that have been identified as vulnerable to protest action’, such as mining and forestry. Michael Safi, ‘Tasmania to focus anti-protest laws on anti-forestry and mining activists’ *The Guardian* (28 October 2014) <<https://www.theguardian.com/politics/2014/oct/28/tasmania-to-narrow-anti-protest-laws-to-target-anti-forestry-and-mining-activists>> accessed 9 January 2017.

<sup>109</sup> Michael Safi, ‘Tasmania to focus anti-protest laws on anti-forestry and mining activists’ *The Guardian* (28 October 2014) <<https://www.theguardian.com/politics/2014/oct/28/tasmania-to-narrow-anti-protest-laws-to-target-anti-forestry-and-mining-activists>> accessed 9 January 2017.

American-led anti-pipeline protests at Standing Rock, where, according to the Sioux tribe, the oil pipeline would endanger water supply and cultural heritage. The award-winning journalist Amy Goodman was charged by a North Dakota state prosecutor for rioting, because of her documenting the protests.<sup>110</sup> The charges against Goodman were dropped, but at least two documentary filmmakers continue to face felony charges for recording the pipeline protests.<sup>111</sup>

The definitions of law the legal ‘insiders’ are most familiar with (the law as a closed system of positive rules, the law as an institutionalized normative order, or as a social system, for example) are not the only possible narratives of law. The law can also be constructed as something malleable and mercurial. The appropriate approach to law naturally depends on research interests. My approach has been to stretch the concept of law in order to delve deeper into the questions of subjectivity and othering. It was almost as a side effect that I ended up challenging the stories we tell ourselves about ‘us’ and our law. This, in turn, left me with the question of responsibility – perhaps another paradox of the law. The story of law that we cherish is one which distributes responsibility. However, by distributing responsibility, the law also sets limits to it.<sup>112</sup> The question is whether the legal notion of responsibility limits our sense of overall responsibility to the extent that we are unable to acknowledge our role in contributing and upholding global inequality, and the ways we benefit from it. We are, to some extent, able to recognise that the refugees in Europe have a right to protection. But while we are preoccupied with filtering the ‘genuine’ refugees from ‘the economic migrants’ and

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<sup>110</sup> The new charge comes after the prosecutor dropped criminal trespassing charge. -- ‘Breaking: ND Prosecutor Seeks “Riot” Charges Against Amy Goodman For Reporting On Pipeline Protest’ *Democracy Now* (15 October 2016) <[https://www.democracynow.org/2016/10/15/breaking\\_nd\\_prosecutor\\_seeks\\_riot\\_charges](https://www.democracynow.org/2016/10/15/breaking_nd_prosecutor_seeks_riot_charges)> accessed 9 January 2017.

<sup>111</sup> Sam Levin, ‘Documentary film-makers face decades in prison for taping oil pipeline protests’ *The Guardian* (20 October 2016) <<https://www.theguardian.com/us-news/2016/oct/20/north-dakota-oil-pipeline-protest-film-makers-face-prison>> accessed 9 January 2017; see also Sam Levin, ‘Dakota Access pipeline protests: UN group investigates human rights abuses’ *The Guardian* (31 October 2016) <<https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>> accessed 9 January 2017.

<sup>112</sup> Scott Veitch, *Law and irresponsibility: on the legitimization of human suffering* (Routledge-Cavendish 2007).

‘bogus asylum seekers’, we seem to be unable to acknowledge our responsibility in creating global inequality. The Western world is heavily dependent on the cheap production of goods that are outsourced to the East and South. As Delgado et al. point out, formerly colonised people of colour are generally afflicted by poor work conditions, sometimes amounting to serious health hazards as well as inadequate salaries. After robbing the colonised ‘third world’ of its riches, sowing political discord and suppressing the development of local leaders, the ‘first world’ continues to exploit the former colonies.<sup>113</sup> The same applies to the effects of climate change: while the Western standard of living and consumerism have contributed to the climate change disproportionately, most of its damaging effects, such as flooding and desertification, affect the former colonised populations.

In order to approach the problem of responsibility, we might do well by asking what the stories are that we tell ourselves and how they affect the way we perceive reality and our role in relation to others. In the following two sections, I touch upon this task by asking, how is the seemingly unified human subject in law fragmented? What are the implications of this fragmentation? In what ways does our perception of the law’s neutrality contribute to othering? And finally, do the theories of civil disobedience contribute in the deceptive narrative of continuous and inevitable progression towards greater liberty and improved democracy?

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<sup>113</sup> Richard Delgado and Jean Stefancic, *Critical race theory: an introduction* (Critical America, 2nd edn New York University Press 2012) 111–112.

### 4.3 THE SUBJECT

*He does not see her, because for him there is nothing to see.*<sup>114</sup>

With its classifications, language makes the world seem controllable and less arbitrary. It creates structures and order, which are then perceived as real and natural.<sup>115</sup> In his seminal work, *Orientalism*, Edward W. Said proposes that the Western identity is fundamentally founded upon othering logic, one which dehumanises and devalues ‘the other’, namely the ‘primitives’, ‘uncivilised’ and other racialised subjectivities. According to Said, the ‘East’ was reduced to simple typologies by and for the ‘Westerners’ in order to make the ‘East’ more conceivable. The politicisation of Islam in Western discourses, the deep suspicion towards Muslims, and the legitimisation of colonialism and violence against the dangerous Muslim subject, originate from this tradition.<sup>116</sup> This story, which has come ‘true’, has tangible consequences.

Butler observes that the progressive history that ‘we’ in the ‘West’ write for ourselves positions the ‘Western’ human as the human worth valuing and protecting, while the Islamic population is considered ‘not yet having arrived at the idea of the rational human’.<sup>117</sup> Interestingly, Butler also discusses torture as a means to construct the subject of Islam and ‘the Arab mind’. For her, torture can be understood as a technique of modernisation.<sup>118</sup> The tortured thus becomes that which constitutes the exemplary modern subject by being its negation, its ‘other’. Torture, then, is not an aberration

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<sup>114</sup> Toni Morrison, *The Bluest Eye* (1981) as cited in Chris Weedon, *Identity and Culture: Narratives of Difference and Belonging* (Open University Press 2004) 8.

<sup>115</sup> Zygmunt Bauman, *Modernity and ambivalence* (Polity Press 1991) 1.

<sup>116</sup> Edward W. Said, *Orientalism: Western conceptions of the Orient* (Repr. with a new afterword edn Penguin Books 1995) 202–208, 284–287; Edward W. Said *Orientalismi* (Kati Pitkänen tr, Gaudeamus University Press, Helsinki 2011) 337–341.

<sup>117</sup> Judith Butler, ‘Sexual politics, torture, and secular time’ (2008) 59(1) *The British Journal of Sociology* 1, 15.

<sup>118</sup> *Ibid* 15–18.

of modernity, but an inseparable function of the ‘civilisational mission’. For Butler, ‘[t]his very process not only justifies, but also necessitates the rationale of torture of “the other”’.<sup>119</sup>

What does all this mean for the law and its subjects? The law legitimates itself with the claim of justice and equality: the goddess of justice is blindfolded so that she cannot base her judgement on the characteristics of the person seeking justice. At the same time, however, the law is infamous for legitimating the ultimate forms of othering, such as slavery, institutionalised racism, the discrimination of women, the disabled, and sexual and gender minorities. Quoting Nietzsche, Douzinas and Gearey describe the law as a demarcating force that inheres ‘a fear of the foreign, strange, uncanny, outlandish’ and thus being ‘defined by the separation it allows between “us” and “them”’.<sup>120</sup> Contrary to what we would like to believe, the law is not based on universal humanity, nor promotes universal human rights.<sup>121</sup>

The process of othering discussed in *The detainee, the prisoner, and the refugee* and *Forever again* can be examined within a larger context of fragmentation of the seemingly unified legal subject. Contrary to what the law suggests, the legal subject is not unified, autonomous, and does not include everyone. Evidence for the fragmentation of the legal subject can be traced back all the way to the history of slavery. Slavery has often been understood as a form of total non-recognition, with the slave lacking the basic characteristics of personhood.<sup>122</sup> However, Dayan’s analysis of the genealogy of the Guantanamo detainee and the supermax prisoner demonstrates that what occupied the lawyers’ minds ‘on the eve of the Civil War was not to affirm the slave as property, but to articulate the personhood of slaves in such a way that it was disfigured, not erased’.<sup>123</sup>

According to Dayan, the US government and the courts are currently turning living, sentient persons into inanimate, rightless objects, and the process is actually similar to that of creating the

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<sup>119</sup> Ibid 18–19.

<sup>120</sup> Costas Douzinas and Adam Gearey, *Critical jurisprudence: the political philosophy of justice* (Hart Publishing 2005) 52, 60, 286.

<sup>121</sup> Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2013) 185.

<sup>122</sup> See ibid 198.

<sup>123</sup> Ibid 140, see also xiv, 49, 53–54, 60, 65.

subjectivity of the slave. The slave has been ‘reborn in the body of the prisoner’.<sup>124</sup> Dayan argues that the law’s alchemy produces grey zones between the categories of ‘human’, ‘animal’, and ‘thing’. While these categories are apparently clear-cut, Dayan demonstrates that they are in fact fragmented and overlapping. Not only does the law uphold a hierarchical dichotomy between ‘human’ and ‘animal’, but also between ‘human’ and ‘non-human’, or ‘less-than-human’. Similarly, Douzinas and Gearey, albeit from a slightly different point of view, assert that historically the legal system is fractured into two-tier practices, such as the ‘separate but equal’ doctrine of the Constitutional Court of the US, and the South-African apartheid. Similar duality is currently evident in the manner that the suspected terrorists and refugees are treated. Douzinas and Gearey describe this duality as ‘the law of colour’. For them, the essential problem is not that the law discriminates, but that it creates two laws according to colour and race.<sup>125</sup>

The main finding in the last two articles, *The detainee, the prisoner, and the refugee*, and *Forever again*, is that that violent subject production techniques and discursive blame avoidance strategies relate to the racialised subjectivation of the detainees as dangerous and undemocratic, thus worthy of only reduced legal protection. The disturbing conclusion to be drawn from the analysis is precisely the fragmentation of the human subject in law – the explicit dichotomies of law, such as human/animal, may be clear-cut, but the category of ‘human’ itself is implicitly fragmented. The fragmentation of ‘human’ into sub-categories, such as the detainee, the prisoner, and the refugee, allows the law to treat ‘us’ humans differently according to the way we are subjectified by the law. Combined with securitisation<sup>126</sup> and the discourse of threat, the repercussions of fragmenting the subject and the emergence of the dangerous individual reproduce law’s discriminatory effects. While

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<sup>124</sup> Ibid 60, see also 139, 181, 186, 246–247.

<sup>125</sup> Costas Douzinas and Adam Gearey, *Critical jurisprudence: the political philosophy of justice* (Hart Publishing 2005) 198.

<sup>126</sup> Securitisation means turning subjects into matters of security. Successful securitisation involves designating a threat, which is framed in such a way that it requires immediate intervention, and thus legitimates the demands for special measures and determining new priorities. Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner 1998) 21–24, 36; see also Neve Gordon, ‘Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs’ (2014) 48(2) *Law & Society Review* 311, 317–318.

modern criminal law is in principle based on the idea that penal law has a claim over an individual owing to their past offences, Cole maintains that the notion of legal responsibility can be expanded in order to allow the authorities to target individuals not for what they have done, but for what they might do. Often, Cole argues, these predictions rely on skin colour, nationality, or political or religious affiliations.<sup>127</sup>

Despite these rather bleak observations, subjectivation is not primarily a process that imposes subjectivities on us. Rather, subjectivity is assumed and enacted by the subjects themselves.<sup>128</sup> The role of power in subjectivation is therefore two-fold: subjectivation is by definition a process of subordination, but it is also a process that allows the power relationship to be reversed by the subject assuming the power that created it.<sup>129</sup> This allows subjectivity to be contested and transformed. The powerfulness of classifications is precisely why resisting them and taking them into one's own hands is transformative. As Bauman aptly puts it: '[s]ince the sovereignty of the modern state is the power to define and to make definitions stick – everything that self-defines or eludes the power-assisted definition is subversive'.<sup>130</sup>

Returning to the theories of civil disobedience, Rosa Parks and those like her are often celebrated as paragon citizens who publicly address a manifestly unjust policy or law in order to communicate with their political community and appeal to its shared values. Although Parks may have broken the letter of the law, as the story goes, she remained faithful to the legal order and in fact acted according to the founding principles of the community's law. Rosa Parks' refusal to give up her seat to white passengers corresponds to what most theorists would consider as fulfilling the requirements of civil disobedience. In other words, Park's action was a public, non-violent and conscientious act, which presumably engaged with the moral sentiments of her fellow citizens. But was Parks' refusal to give her seat to a white passenger really simply about the

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<sup>127</sup> David Cole, 'The New McCarthyism. Repeating History in the War on Terrorism' in Austin Sarat (ed.) *Dissent in Dangerous Times* (University of Michigan Press 2005) 111–145.

<sup>128</sup> See e.g. Judith Butler, *The psychic life of power: theories in subjection* (Stanford University Press 1997) 84–85.

<sup>129</sup> *Ibid* 13, 93.

<sup>130</sup> Zygmunt Bauman, *Modernity and ambivalence* (Polity Press 1991) 8.



discriminatory seat policy? The answer is obviously no. Instead, Parks challenged the whole system of racial segregation and the literal and symbolic dividing of 'the other' from 'us'. In fact, by refusing to give up her seat, Parks refused to be subjectified as less-than-white thus dismantling the dichotomy of white/non-white.

When I combined the theorisation of disobedience with that of the subjectivity in my work, this resulted in re-thinking what disobedience is. Apart from communicating with one's political community and expressing deep commitment to that community, disobedience can be understood as a means of challenging both the totalising citizen subjectivity and the fragmentation of the human subject. Generally speaking, the theories of civil disobedience do not sufficiently recognise the depth of the disobedient act and the ways it challenges the established hierarchy of subjectivities. At the heart of the struggle for justice, such as the American civil rights movement and the Gandhian struggle for Indian independence, is the question of subjectivity. In other words, this is a question of who is considered to be a full human subject, and what that subject is like.

This shift in my understanding of civil disobedience allowed me to frame the so-called headscarf cases of the European Court of Human Rights as civil disobedience. The reason is not that the refusal to remove the Islamic headscarf could be described in terms of civil disobedience – it is, after all, public, non-violent, non-revolutionary, and based on moral (religious) beliefs. This line of thought would, however, soon lead to deliberations on the justifiability of the act. What interests me instead is that like Rosa Parks, the woman refusing to unveil herself refuses the totalising subjectivity reserved for her. But whereas we, although anachronistically, identify with Rosa Parks and perceive her disobedience as something that promoted the modern idea of equality, the veiled woman represents just the opposite. Western identity has been constructed in relation to the perceived backwardness of Islam, and it is therefore difficult to combine it with 'our' progressive perception of ourselves.

What may be the most threatening, even inconceivable, is someone who refuses to take sides. This is threatening because it exposes the arbitrariness of the dichotomies and therefore unravels

them altogether.<sup>131</sup> In a recent ECtHR case concerning the Islamic full-face veil ban, *S.A.S. v. France*, the applicant attempted to combine modern, autonomous, and free subjectivity with Islam, as she identified herself both as a modern, Western citizen, and as a devout Muslim. The Court, however, rejected her self-identification and emphasised the importance of the human face in interpersonal relations ‘not because it de facto prevents social interaction and living together, but because a veiled woman is perceived as “the other” by the majority’, as I observe elsewhere.<sup>132</sup> The Muslim woman wearing the headscarf or the full-face veil cannot be included in ‘us’, because that would erode the distinction between ‘us’ and ‘the other’ and would therefore erode not only ‘the other’, but ‘us’ as well.

Ultimately, in the headscarf cases, what is weighed and balanced in the scales of law by the European Court of Human Rights are not the personal freedoms enshrined in the Convention against the ‘competing interests’ of the society, but the autonomy of the legal subject in relation to the demand for loyalty to the state. The conflict, therefore, lies not between the personal and political or individual and society, but within the subjectivity of a citizen who is supposed to be a subject in both senses of the word. This, in fact, relates to the paradox that the theories of civil disobedience struggle with: whether or not one should be an individual moral agent first and foremost, or whether the duty to one’s community prevails. Being ‘a good citizen’ and ‘a good person’ are sometimes considered mutually exclusive, because ‘a good person’ insists on holding on to their personal beliefs even at the expense of the community to which they belong.<sup>133</sup> At the same time, however, an individual challenging the unjust rules of the community is celebrated as a true citizen.

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<sup>131</sup> See *ibid* 56.

<sup>132</sup> Kati Nieminen, ‘S.A.S. v. France: Law, Islamophobia and the full-face veil ban’ (Unpublished manuscript 2017).

<sup>133</sup> See e.g. Hannah Arendt, *Crises of the republic* (Harcourt Brace Jovanovich 1972) 61–62, 65, 76, 84–85; Kimberley Brownlee, *Conscience and Conviction. The Case for Civil Disobedience* (Oxford University Press 2015); John Rawls, ‘Definition and Justification of Civil Disobedience’ in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (first published 1971, Routledge 1991) 103, 107, 114, 120. I believe that the tension between civil disobedience, celebrated as the ultimate performance of citizenship, and conscientious objection, regarded as a selfish disengagement with the rules of the community, derives from this source.

From the perspective of the law, and from the perspective of civil disobedience, hunger striking would be considered irrational and incomprehensible. The hunger striker does not seem to communicate in any comprehensible language, and does not even appear to have a clear message. However, the hunger striker is perhaps better able than the civil disobedient or the applicant in the court of law to address the problem of subjectivation. Perhaps the hunger striker can be best understood with what Foucault designates as anti-authority struggles against normalising power. Anti-authority struggles target the power effects such as the subjectivation as less-than-human, and not simply the violent practices producing it. And unlike the struggles described by the theories of civil disobedience, anti-authority struggles do not expect to find a solution, such as revolution, liberation or legal reforms. Instead, '[t]hey are struggles that question the status of the individual', and 'revolve around the question: Who are we?'<sup>134</sup> Instead of endeavouring to challenge the techniques of violent subject production, the hunger striker directly addresses the problematic subjectivity. In *The detainee, the prisoner, and the refugee*, I argue that the hunger striker is able to call out the law on its violence and that the law is unable to address the hunger striker, who refuses to 'speak law'. This is a powerful act of resistance that the law cannot silence.<sup>135</sup> However, it is possible to re-interpret the hunger striker's protest in legal language by using expressions such as 'manipulative self-injurious behavior' and 'coordinated efforts to disrupt camp operations'.<sup>136</sup> These words re-introduce hunger striking in legal terms and invite the law to approach hunger striking as a matter of order and security.

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<sup>134</sup> Michel Foucault, 'The Subject and Power' in James D. Faubion (ed.) *Power. The Essential Works of Michel Foucault* (Penguin Books 2002) 330–331; see also Samuli Hurri, *Birth of the European individual: law, security, economy* (Routledge, 2014) 172.

<sup>135</sup> Emilios Christodoulidis and Scott Veitch, 'The Ignominy of Unredeemed Politics: Revolutionary Speech as Différend' (1997) 10 (29) *International Journal for the Semiotics of Law*.

<sup>136</sup> See Kati Nieminen, 'The Detainee, the Prisoner, and the Refugee. The Dynamics of Violent Subject Production' (e-pub. ahead of print 2016) *Law, Culture, and the Humanities*.

## 4.4 DISOBEDIENCE

*Collective actors involved in civil disobedience invoke the utopian principles of constitutional democracies, appealing to the ideas of fundamental rights or democratic legitimacy.<sup>137</sup>*

My interest in the theories of civil disobedience does not stem from the aim to define the phenomenon in order to demarcate it from ordinary crimes, terrorism, protests and other forms of resistance and disobedience, nor from the normative approach that the theories of civil disobedience tend to adopt. Instead, my initial interest was rather instrumental, as I was interested in how to identify cases of disobedience to examine what the law's approach to them reveals about the law itself. At some point during the process, I thought I had lost the question of civil disobedience, or moved beyond it, as I became interested in other types of dissent and resistance. However, I realised that after taking a long detour into subjectivation and othering, I did, after all, have something to contribute to the discussion on civil disobedience and conscientious objection. Subjectivity in relation to disobedience was discussed in the previous section. In this section, I explore the role of the theories of disobedience in producing the narrative of 'us'. What if the theories of civil disobedience would be interpreted as stories we tell ourselves about ourselves?

For some time now, academics as well as those in the arts and entertainment have been challenged by indigenous scholars, artists and activists with claims of cultural appropriation. Appropriation is derived from Latin *appropriare*, which means 'to make one's own'.<sup>138</sup> This term thus refers to taking and/or profiting from a culture that is not one's own in terms of adopting aspects such as cultural artifacts, expressions or knowledge. This concept is not easy to grasp, as it is difficult to determine what 'taking' means. Questions also arise as to what a culture is, who belongs to that

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<sup>137</sup> Jean L. Cohen and Andrew Arato (1992) as cited Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 383.

<sup>138</sup> Richard A. Rogers, 'From Cultural Exchange to Transculturation: A Review and Reconceptualisation of Cultural Appropriation' (2006) 16(4) *Communication Theory* 475.

culture and what can be taken.<sup>139</sup> These questions are outside of the scope of this thesis, but I believe that despite its difficulties, the concept of appropriation can be used successfully, especially in exposing the underlying power imbalances in society. In the following, I observe the phenomenon of appropriating the struggle of many who are civil disobedient into the narrative of nation, democracy and citizenship. This may seem unfair to the scholars whose work on the theory of civil disobedience has genuinely aimed at justifying certain forms of illegal action, to facilitate civil protest and to enhance democracy. My intention is not to thwart these efforts. It should also be noted that my conclusions are not based on an exhaustive analysis, and are therefore vulnerable to criticism due to selective reading. Despite these weaknesses, my intention is to be able to provide an alternative perspective on how ‘we’ create insiders and outsiders in our discourses.

As Ziff and Rao assert, the important questions around (cultural) appropriation are political and relate to power relationships.<sup>140</sup> The question is when we tell the story of civil disobedience as a way to ‘[reassert] the link between civil and political society’<sup>141</sup>, whether we are recounting someone else’s story. Are we appropriating the story of the subaltern into our own story so that it silences the subaltern?<sup>142</sup> Is it an act of assimilation? The narrative approach to the theories of civil disobedience can be used to re-construct them as stories we tell ‘ourselves’ about the way in which ‘we’ came into being and about what ‘we’ think ‘we’ are like. Scrutinising the political effects of a narrative requires that storytelling is not understood merely as ‘a way of creating community but as a resource for dominating others, for expressing solidarity, for resistance and conflict; a resource that is, in the

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<sup>139</sup> Bruce Ziff and Pratima V. Rao, *Borrowed power: Essays on cultural appropriation* (Rutgers University Press 1997) 1–5.

<sup>140</sup> Ibid 5–7.

<sup>141</sup> Jean L. Cohen and Andrew Arato (1992) as cited Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, 1996) 383.

<sup>142</sup> Spivak has argued that ‘[f]or the “true” subaltern group, whose identity is its difference, there is no unrepresentable subaltern subject that can know and speak itself. Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson & Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture* (University of Illinois Press 1988) 285; see also the narrative of imperialism and epistemic violence, production of history as a narrative; ibid 280–283.

continuing negotiation through which humans create language and society and self as they talk and act'.<sup>143</sup> Any version of history is quite literally a story that creates the events it claims to describe.<sup>144</sup>

The contemporary discussion on civil disobedience is roughly divided into two distinct discourses. The first, the liberal theories of civil disobedience, are predominantly rights-oriented, perceiving disobedience as a form of individual, conscientious protest against governments or political majorities that transgress the community's moral values. The second – radical democratic theories – perceive civil disobedience as a practice of collective self-determination, and as a counterweight for the unavoidable structural democratic deficits that are inherent in state institutions.<sup>145</sup> Despite their different approaches, it can be claimed that the liberal and radical democratic theories of civil disobedience both concentrate predominantly on the time defying question of how and in what circumstances civil disobedience can be justified politically, morally or legally.

These theories have varying stances on violence, the willingness to accept legal punishment, and the requirement of publicity of civil disobedience. What most theories share, however, is their insistence that in a reasonably just society, civil disobedience must have a communicative function and illustrate overall fidelity to the legal order, or at least to the general moral principles of the community.<sup>146</sup> As my approach to disobedience is somewhat different, it is unlikely that I am able to make a significant contribution to this particular debate. Rather, my contribution concerns the role the theories themselves potentially have in totalising the citizen subjectivity and in creating the narrative of the

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<sup>143</sup> Barbara Johnstone, 'Discourse analysis and narrative' in Deborah Schiffrin, Deborah Tannen, and Heidi E. Hamilton (eds.) *The handbook of discourse analysis*. (Blackwell 2001) 644.

<sup>144</sup> See *ibid* 643, 644–645.

<sup>145</sup> Robin Celikates, 'Democratizing civil disobedience' (2016) 42(10) *Philosophy & Social Criticism* 982, 988–989.

<sup>146</sup> See Hugo Adam Bedau, 'Introduction' in Hugo Adam Bedau (ed.) *Civil disobedience in focus* (Routledge 1991) 9, 11; John Rawls, 'Definition and Justification of Civil Disobedience' in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (first published 1971, Routledge 1991) 104, 105; Peter Singer, 'Disobedience as a Plea for Reconsideration' in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (first published 1973, Routledge 1991) 122–129; Henry David Thoreau, 'Civil Disobedience' in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (Routledge 1991) 30, 34.

democratic West. Let us consider the following quote from Rawls in the light of Rosa Park's act of disobedience:

It should also be noted that civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines [...] Instead it invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. [...] By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed [as being in persistent and deliberate violation of the basic principles of this conception], or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.<sup>147</sup>

What is the commonly shared sense of justice that Rosa Parks can be said to appeal to? It is, of course, possible to reconstruct an underlying constitutional principle of equality that prohibits not only slavery, but racial segregation as well. On the other hand, interpreting Tocqueville, Arendt states that a fundamental weakness of the abolitionist movement in the US was that it was not able to appeal 'to the law of the land nor the opinion of the country', but instead merely to individual conscience, because there was nothing in the Constitution or in the intent of its framers that could have been construed as to include the slaves in the 'original *consensus universalis* of the American republic'.<sup>148</sup> In fact, the emancipation of the slaves was not meant to include them into 'us', but instead to establish either racial segregation, or to deport the

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<sup>147</sup> John Rawls, *Theory of Justice* (Harvard University Press 2005) 365–366.

<sup>148</sup> Hannah Arendt, *Crises of the republic* (Harcourt Brace Jovanovich 1972) 90; cf. Frederick Douglas as cited in Robert M. Cover. 'Nomos and Narrative' (1983) 97(4) *Harv L Rev.* 38.

former slaves from the US soil.<sup>149</sup> Rather than the correct constitutional interpretation, however, the real question concerns the purpose of the insistence on ‘the commonly shared conception of justice’ in theories of civil disobedience.

The heroes of civil disobedience described in the theories incorporate Rosa Parks and other celebrated individuals – disengaged from their supporting communities – into a narrative, within which ‘we’ – the ones whose laws were broken – regain our dignity. According to the narrative, in a reasonably just society, there was a law which was misguided and contrary to the fundamental principles of the constitution. Fortunately, there was a brave individual who pointed this out to their respective community, which was then ready and willing to reconsider the law – and gradually the norms of the society better reflected its moral sentiments.<sup>150</sup> To be fair, there are exceptions to this storyline. For example, Celikates questions the idea that the celebrated cases of civil disobedience, namely those of Thoreau, Gandhi and King, appealed to the majority’s sense of justice because in these cases, ‘civil disobedience seems at odds with, and indeed directed against the majority’s moral sentiments’.<sup>151</sup> Singer goes even further and argues that the Western political systems are not democratic to begin with, and that therefore the criteria for justifiable civil disobedience cannot be applied.<sup>152</sup>

The majority of scholars, however, seem to take the Western democracies for granted and insist that justifiable civil disobedience indicates either fidelity to the law in general, or at least engagement in rational communication with one’s community and provoking democratic reflection within it.<sup>153</sup> Justifiable civil disobedience is, in

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<sup>149</sup> Ibid. See also John Rawls, ‘Definition and Justification of Civil Disobedience’ in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (first published 1971, Routledge 1991).

<sup>150</sup> See e.g. Ronald Dworkin, ‘On Not Prosecuting Civil Disobedience’ (1968) *The New York Review of Books*. <<http://www.nybooks.com/articles/1968/06/06/on-not-prosecuting-civil-disobedience/>> accessed 12 January 2017; c.f. Herbert J. Storing, ‘The Case Against Civil Disobedience’ in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (Routledge 1991) 85–102.

<sup>151</sup> Robin Celikates, ‘Democratizing civil disobedience’ (2016) 42(10) *Philosophy & Social Criticism* 982, 984–985; see also Hannah Arendt, *Crises of the Republic* (Harcourt Brace Jovanovic 1972) 77; Peter Singer, *Democracy and Disobedience* (Clarendon Press 1973) 150.

<sup>152</sup> Singer, Peter, *Democracy and Disobedience*, (Clarendon Press, 1973).

<sup>153</sup> See e.g. Kimberley Brownlee, ‘The Civil Disobedience of Edward Snowden: A reply to William Schauerman’ (2016) 42(10) *Philosophy and Social Criticism* 965, 968; Maeve



fact, regarded as a function of true democracy, ultimately demonstrating the commitment of the disobedient to their political communities:

[T]he justification of civil disobedience relies on a *dynamic understanding* of the constitution as an unfinished project. From this long-term perspective, the constitutional state does not represent a finished structure but a delicate and sensitive – above all fallible and revisable – enterprise, whose purpose is to realize the system of rights *anew* in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically. This is the perspective of citizens who are actively engaged in realising the system of rights.<sup>154</sup>

The above description of democracy is, of course, desirable. However, appropriating the stories of Rosa Parks and others who are disobedient into this narrative, makes ‘our’ failure to deliver justice invisible. Instead, the onus is on the disobedient to demonstrate loyalty to the political community and its fundamental values. In fact, the motives of the disobedient seem to be disproportionately emphasised in the theories of civil disobedience:

[T]o be *justified* in civilly disobeying, we must have a good cause, a good set of motivations, and a suitably constrained set of practices with modest consequences [...].<sup>155</sup>

I hold that the civility of civil disobedience lies not in the non-violence, publicity, or willingness to accept punishment, but in the conscientious, communicative motivations of civil disobedients. Civil disobedience involves not just a communicative breach, but a *conscientious* communicative

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Cooke, ‘Civil obedience and disobedience’ (2016) 42(10) *Philosophy & Social Criticism* 995, 1000; William E. Schauerman, ‘What Edward Snowden can teach theorists of conscientious law-breaking’ (2016) 42(10) *Philosophy & Social Criticism* 958, 961.

<sup>154</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 384. Emphasis original.

<sup>155</sup> Kimberley Brownlee, *Conscience and Conviction. The Case for Civil Disobedience* (Oxford University Press 2015), 8. Emphasis original.

breach of law motivated by steadfast, sincere, and serious, though possibly mistaken, moral commitment.<sup>156</sup>

But why do we need to know and assess Rosa Parks' motives for disobeying the bus driver in order to recognise the value of her action? Does it matter whether she acted out of deeply held, sincere conviction or sudden frustration, even anger? Does the notion of the rational citizen and the preconditions for justifiable disobedience, and particularly the insistence on appealing to the moral values of the community, blind us to the profound question posed by the disobedient for society? In the quotation from Singer below, the disobedient act is domesticated to the extent that if the majority refuses to engage with the disobedient's plea, 'this sort of disobedience must be abandoned':

A form of disobedience [...] aims, not at presenting a view to the public, but at prodding the majority into reconsidering a decision it has taken. A majority may act, or fail to act, without realising that there are truly significant issues at stake, or the majority may not have considered the interests of all parties, and its decision may cause suffering in a way that was not foreseen. [...] Disobedience which aims to make the majority reconsider in this way is not an attempt to coerce them, and within limits broadly similar to those just discussed in connection with disobedience for publicity, it is compatible with acceptance of a fair compromise as a means of settling issues. Once it becomes apparent that the majority are not willing to reconsider, however, this sort of disobedience must be abandoned.<sup>157</sup>

The theories of disobedience seem to be preoccupied with preserving the notion of community, of 'us', to an extent that it appears to be at least a central part of the theories as pondering the justifiability of disobedience and its role in democracy. Perhaps the theories of civil disobedience contribute as much in constructing 'us', a community of ideal citizens, and in re-producing the story of

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<sup>156</sup> Ibid 23–24. Emphasis original.

<sup>157</sup> Peter Singer, 'Disobedience as a Plea for Reconsideration' in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (Routledge 1991).

democratic West, as they do for mapping the limits of democratic action. The autonomous citizens, who are committed to their respective communities, and whose behaviour is rational and predictable, are needed in order to legitimate the sovereign rule.<sup>158</sup> Do the theories of civil disobedience then (re)produce the citizen in a way that is predictable and controllable? Perhaps the theories of civil disobedience would be best understood as another story we tell ourselves about ourselves: a story of a reasonably just and democratic society, and of rational, autonomous citizens, who share a certain set of values and moral principles.

Regarding othering, my question is whether the theories of civil disobedience endorse the language of belonging that paints a false picture of a community of autonomous and rational people with a shared set of fundamental values that enable them to agree on some basic principles enshrined in the democratic order. Is it not disingenuous to foster a narrative of ‘us’ and belonging in the context of the struggle of the civil rights movements against racial discrimination – to celebrate the civil disobedients as ‘true citizens’ who ‘exemplify what it means to be a citizen in reasserting their political agency against politically entrenched and often invisibilised forms of domination, exclusion, or marginalisation’?<sup>159</sup> My critique here is not directed against the brave individuals who have challenged unjust regimes, nor is it my aim to downplay the changes they have initiated or their belonging in ‘us’. Instead, I want to examine critically the ways in which these individuals are singled out, segregated from their support groups, and celebrated as one of ‘us’ in many theories of civil disobedience, instead of recognising their struggles as ‘the other’.

The question of belonging is interesting if one reads Martin Luther King’s Letter from Birmingham City jail in the light of ‘us’ and ‘the other’. King’s letter addresses his ‘fellow clergymen’, who had called the protests of the civil rights movement ‘unwise and untimely’, in an attempt to explain the rationale behind direct

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<sup>158</sup> See Michel Foucault, ‘The Subject and Power’ in James D. Faubion (ed.) *Power. The Essential Works of Michel Foucault* (Penguin Books 2002) 326; Samuli Hurri, *Birth of the European individual: law, security, economy* (Routledge 2014) 161–172.

<sup>159</sup> Robin Celikates, ‘Democratizing civil disobedience’ (2016) 42(10) *Philosophy & Social Criticism* 982, 985–986.

action and to persuade the ‘white moderate’.<sup>160</sup> According to King, non-violent direct action has four steps: 1) determining whether injustice is alive 2) negotiation, 3) self-purification (such as workshops on non-violence), and 4) direct action. The aim of direct action is to re-engage the respective community in negotiation.<sup>161</sup> Thus, King does address his own political community. Yet he also emphasises the gulf between the everyday experiences of ‘the negroes’ and ‘those who have never felt the stinging darts of segregation’, and who have not witnessed ‘vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at a whim’.<sup>162</sup> Thus, belonging in King’s letter is unstable – he does include himself and other civil rights protesters in ‘us’, but he constructs a divide between the privileged white population and the oppressed black minority. Highlighting only the former aspect of the struggle silences the painful experiences of the civil rights activists as ‘the other’. In order to better understand the injustices of the present, we need to fully acknowledge the injustices of the past.

Understood within the context of social contract theories, the theories of civil disobedience can be perceived as part of the foundational narratives that legitimate the normative status of a given legal system.<sup>163</sup> The justification of civil disobedience is usually bound to the idea that the obligation to obey the law, derived from the social contract, is a given, and the justification of civil disobedience, if there is any, is derived from a potential breach of that contract. Interpreted in this way, civil disobedience is not actually a problem for the social contract theory – on the contrary. From the perspective of justifying civil disobedience, this may be a plausible starting point. However, from a perspective that is critical of all-embracing and appropriating master narratives, it seems that in the context of social contract theories, civil disobedience is a rather diluted form of protest.

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<sup>160</sup> Martin Luther King Junior, ‘A Letter from Birmingham City Jail’, in Hugo Adam Bedau (ed.) *Civil Disobedience in Focus* (first published 1963, Routledge 1991) 68–84 1963.

<sup>161</sup> Ibid 70–71.

<sup>162</sup> Ibid 73.

<sup>163</sup> Greta Olsson, ‘Narration and Narrative in Legal Discourse’ *The Living handbook of narratology* (17 January 2014) <http://www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse> accessed 5 July 2017.

The master narrative of law is that it is ‘ours’ in that the law-giver and the ones it addresses are the same. This notion has been challenged by Lyotard, who reminds us that the “we” who gives the law is not identical with the “we” who receive it’.<sup>164</sup> Christodoulidis and Veitch argue, following Lyotard, that this casts a shadow of doubt on law, as the law’s legitimacy is generally thought to derive from the sovereign, unified people.<sup>165</sup> Citing Benhabib, Christodoulidis and Veitch point out the homogenising effects of creating ‘the people’ and ‘consensus’ wherein the legitimacy of the law is derived from.<sup>166</sup> Regarding the theories of civil disobedience, it can be claimed that for as long as the civil rights activists in the US officially remained ‘the other’ – before the adoption of the Civil Rights Act – they were subjected to the ‘logic of identity’ which ‘does violence to those whose otherness places them beyond the homogenising logic of the “we”’.<sup>167</sup> However, on the other hand, they may not become visible and audible in their difference even after being successful in being recognised as citizens. They may still be ‘those who are spoken about’ instead of ‘those who speak’.<sup>168</sup>

In a society where the whole idea of slavery and racial segregation seem outrageous, it is easy to celebrate Rosa Parks and to identify with her. Temporal distance allows us to create a narrative of an inevitable progression of human rights and to place ourselves in that narrative on the side of the virtuous. The

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<sup>164</sup> Jean-François Lyotard (1988) as cited in Emilios Christodoulidis and Scott Veitch, ‘The Ignominy of Unredeemed Politics: Revolutionary Speech as Différend’ (1997) 10(29) *International Journal for the Semiotics of Law* 145.

<sup>165</sup> Emilios Christodoulidis and Scott Veitch ‘The Ignominy of Unredeemed politics: Revolutionary speech as différend’ (1997) 10(2) *International Journal for the Semiotics of Law* 145–147.

<sup>166</sup> Ibid 146–147; Seyla Benhabib, ‘Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida’ (1994) 2(1) *The Journal of Political Philosophy* 1–23.

<sup>167</sup> Seyla Benhabib, ‘Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida’ (1994) 2(1) *The Journal of Political Philosophy* 10.

<sup>168</sup> Ibid; see also Emilios Christodoulidis and Scott Veitch, ‘The Ignominy of Unredeemed Politics: Revolutionary Speech as Différend’ (1997) 10(29) *International Journal for the Semiotics of Law*; the discussion on the normalising and assimilationist aspects on law regarding sexual and gender minorities, see e.g. Judith Butler, *Excitable Speech: A Politics of the Performative*. (Routledge 1997) 133; Brenda Cossman, *Sexual citizens: The legal and cultural regulation of sex and belonging* (Stanford University Press 2007) 2–11, 16–18, 25, 47, 161, 162, 187, 195–201; Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson & Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture* (University of Illinois Press 1988); Carl F. Stychin, *Governing sexuality: The changing politics of citizenship and law reform* (Hart 2003) 3–4, 7, 12–14, 19–22, 36, 41, 54–56, 86.

contemporary examples of civil disobedience, such as the disclosures by Edward Snowden and Chelsea Manning, challenge us to reflect once again on what ‘we’ has become. But why does their conduct seem so much more controversial than the struggle of the civil rights activists? Is it because we are not certain whether or not we want to identify with these contemporary dissidents, whether or not history will celebrate them as paragon citizens, just like Rosa Parks?

Edward Snowden was a CIA systems administrator who leaked classified information about NSA programmes to the *Guardian* and *Washington Post*. Some theorists consider Snowden’s action to fulfil the criteria for civil disobedience: non-evasiveness, dialogic effort, and overall fidelity to the law.<sup>169</sup> What does this type of approach contribute to the discussion of disobedient acts beyond their moral – or even legal – assessment? Does it open our eyes to something that is wrong in our societies? Or does it, in fact, redirect the discussion from that wrong back to the disobedient person and their motives? Is it necessary that the disobedient person is someone we can admire and identify with in order to be able to appreciate what they compel us to see? Sarat explains our ambiguous attitude toward the disobedient. As the theorists of civil disobedience, he also emphasises that while the dissenters resist the prevailing orthodoxy, they nonetheless remain engaged with it. Due to this liminality, the dissenters are often simultaneously celebrated as paragon citizens and accused of disloyalty.<sup>170</sup> The ambiguity towards disobedience and dissent in general is perfectly illustrated by attitudes towards whistleblowers such as Snowden. While they are welcomed as guardians of the community’s shared values, in practice, they face serious charges of high treason and accusations of colluding with terrorists.<sup>171</sup> In our eagerness to define civil

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<sup>169</sup> Kimberley Brownlee, ‘The Civil Disobedience of Edward Snowden: A reply to William Schauerman’ (2016) 42(10) *Philosophy and Social Criticism* 965–970; William E. Schauerman, ‘What Edward Snowden can teach theorists of conscientious law-breaking’ (2016) 42(10) *Philosophy & Social Criticism* 958–964.

<sup>170</sup> Wendy Brown, ‘Political Idealization & Its Discontents’ in Austin Sarat (ed.) *Dissent in Dangerous Times* (University of Michigan Press 2005) 23–24; Austin Sarat, ‘Terrorism, Dissent, and Repression. An Introduction’ in Austin Sarat (ed.) *Dissent in Dangerous Times* (University of Michigan Press 2005) 1–19.

<sup>171</sup> See Elletta Sangrey Callahan, ‘Whistleblowing: Australian, U.K., and U.S. approaches to disclosure in the public interest’ (2004) 44(3) *Virginia Journal of International Law* 879; Mary Kreiner Ramirez, ‘Blowing the whistle on whistleblower protection: A

disobedience and whistleblowing in a way that by definition renders them justifiable and even desirable, what do we miss?

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tale of reform versus power' (2007) 76(1) *University of Cincinnati Law Review* 183; Austin Sarat, 'Terrorism, Dissent, and Repression. An Introduction' in Austin Sarat (ed.) *Dissent in dangerous times* (University of Michigan Press 2005) 7.





## 5. FINDINGS AND METHODOLOGICAL CONTRIBUTION

*No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. [...] Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.*<sup>172</sup>

In 1928, the Supreme Court of Canada considered the meaning of the word ‘persons’ in section 24 of the British North America Act, which provided that the Governor General shall ‘summon qualified persons to the Senate’. Despite the gender-neutral language of the law, no woman had ever been summoned to become a member of the Senate. The Supreme Court decided that ‘persons’ did not include women, but that decision was reversed the following year by the Privy Council, making women eligible to participate in public life.<sup>173</sup> Naffine explains that ‘what had changed in the 60 years over which the “persons” cases were fought was not the legal meaning of the word “persons” nor the chain of cases by which it was interpreted. [...] By the late 1920s, the highest court in the land was committed to a different view of women and their place in public life.’<sup>174</sup>

The above example illustrates the central premise of this thesis that the law operates with categories that are not natural, but constructed. This is a question that concerns the role of legal methodology and the ways in which the law along with the ‘legal insiders’ are relieved of ‘accountability for (unjust) decisions’.<sup>175</sup> The legal method ‘defines its own boundaries, which means that

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<sup>172</sup> Robert M. Cover, ‘Nomos and Narrative’ (1983) 97(4) *Harv L Rev* 4–5.

<sup>173</sup> Mary Jane Mossman, ‘Feminism and Legal Method: The Difference It Makes’ (1986) 3 *Australian Journal of Law and Society* 30, 33.

<sup>174</sup> Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*. (Allen & Unwin, 1990) 42.

<sup>175</sup> *Ibid* 44.

those questions that fall inside the defined boundaries can be addressed, but those outside the boundaries are not “legal” issues’.<sup>176</sup> Law’s irresponsibility, then, results partially from the way in which the law itself is defined, and from the way in which some things are allowed within the law, and some excluded from its reach.<sup>177</sup>

Another point is that the categories created in the legal practices and the meaning attributed to them extend their effect beyond the legal – they contribute to how we perceive reality. This claim, in itself, is not ground-breaking, as it simply reiterates the starting point of social constructionism: that there is no essence to conscientious objection, Islam, the state, the citizen or indeed, the law. That said, my intention is that my articles will contribute to the methodology of socio-legal research, and especially to the critical study of legal argumentation developed by scholars such as Martti Koskenniemi, and to the discursive approaches to law. My analysis on meaning making shows *how* meaning is made in the law either discursively or in other practices, and is intended to reveal both the steps that any court of law and the legal scholar engaging with doctrinal research must take before being able to deduce the outcome and present it in the format of logical deduction as well as how power is exercised in and through the law. The aim is not, however, to create a comprehensive theory of legal meaning making. Instead, the idea is to make inquiries into legal meaning making, and to develop methodologic tools for analysing it.

My research draws from social constructionism and discourse analysis, and demonstrates the idea that ‘what the law does’ depends on how we understand the law itself. The law is replete with narratives: the courts of law can be understood as sites of competing narratives; the way in which the legal norms are interpreted and developed, the court’s interpretation of the context of the relevant events of the case at hand, and even the legitimization story – the origins story of the law – can be understood as a narrative. The law, however, attempts to conceal its storytelling qualities in order to preserve the illusion of the law’s autonomy in

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<sup>176</sup> Ibid 42.

<sup>177</sup> Mary Jane Mossman, ‘Feminism and Legal Method: The Difference It Makes’ (1986) 3 *Australian Journal of Law and Society* 30, 44–45; Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence*. (Allen & Unwin 1990) 44–45.

relation to other disciplines and spheres, and the idea that the law deals exclusively with abstract norms and logical reasoning. Uncovering the law's narratives is therefore a useful way to examine how the law actually works in the world.<sup>178</sup>

Critical studies, including critical legal studies, have adopted narrative approaches to reveal the power relations that the dominant narratives often reproduce. An important question pertains to what can and cannot be said in a framework of a particular story – not only what is or is not said, but what can and cannot be said.<sup>179</sup> I have suggested that the legal language blurs the political protest of the disobedient beyond recognition. Christodoulidis and Veitch make similar observations and state that in order to be heard, the 'revolutionary' must 'accept the language of the tribunal' or vanish.<sup>180</sup> On the other hand, I have argued that it is possible to address the law's violence without directly addressing the law itself and this is exemplified through hunger striking.

Throughout this thesis, I argue that the law constructs subjectivities in a way that does not follow the narrative of a universal legal subject. The universal, autonomous and rational subject of law has been challenged by the critical legal scholars, particularly by the feminist approaches to law. The vulnerable subject has been suggested as the replacement for the liberal subject. The vulnerable subject, capturing the bodily vulnerability of the human being, would arguably be 'more representative of actual lived experience and the human condition', which would inevitably affect our thinking on equality and the role of the state in protecting the vulnerable subject.<sup>181</sup> But what about those whose subjectivity is

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<sup>178</sup> Peter Brooks, 'Narrative in and of the Law' in James Phelan and Peter J. Rabinowitz (eds.) *A Companion to Narrative Theory* (Blackwell Publishing 2005); Robert M. Cover, 'Nomos and Narrative' (1983) 97(4) *Harv L Rev*; Greta Olsson, 'Narration and Narrative in Legal Discourse' *The Living handbook of narratology* (17 January 2014) <http://www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse> accessed 5 July 2017.

<sup>179</sup> See Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson & Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture* (University of Illinois Press 1988).

<sup>180</sup> Judge of the Bader-Meinhof trial, 5/8/75 as cited in Emiliós Christodoulidis and Scott Veitch, 'The Ignominy of Unredeemed Politics: Revolutionary Speech as Différend' (1997) 10 (29) *International Journal for the Semiotics of Law* 156.

<sup>181</sup> Martha Albertson Fineman, 'The vulnerable subject. Anchoring equality in the human condition' in Martha Albertson Fineman (ed.) *Transcending the boundaries of law. Generations of feminism and legal theory* (Routledge 2011) 161, 167.

made vulnerable in and through the law? My approach addresses this awkward question.

In this introduction, I have introduced the theoretical framework, methodology and overall arguments of this thesis. The overall contribution of the research articles can be summarized as follows: first, my analysis shows how the unified citizen subject ('us') is produced and second, it shows how the human subject in law is fragmented and violence legitimated against 'the other'. Lastly, I have taken the common themes discussed in the articles – the law, the subject, and disobedience – further, and tested the potential of the narrative approach on theories of civil disobedience, and particularly (cultural) appropriation as a critical framework for analysis. While narrativity is an established approach to law, cultural appropriation in the legal narratives is a less discussed aspect. My brief inquiry above into the theories of civil disobedience suggest that what they cannot express is the profound and ongoing injustice 'the other' struggles with, and that the silences they create can be perceived through the concept of (cultural) appropriation. Moreover, I argued that the connection the theories of civil disobedience have to the social contract theories provide an interesting perspective on the ways in which the legitimation of the legal system homogenises 'the people' and assimilates the deviating voices.

The second part of this thesis consist of the five previously published articles. Writing a thesis as a collection of articles, some of which have been written relatively early on in the process, provides the reader with visible traces of the development of personal thought and the process of professional growth. I am sure my reader will detect inconsistencies and gaps in what is presented in the introduction on the one hand, and what they find in the articles on the other. This, I suppose, is to some extent inevitable in this format. However, I hope that the discrepancies can be perceived as a development in my thinking rather than as something detrimental to the project.

The central question in the articles is *how* rather than *why* or *whether*. While the notion that the law is not neutral is by no means an innovation, it is important to ask *how* the law's creations come into being. I ask how subjectivity and othering are produced in legal practices, and how discursive choices (re)produce the good citizen

on the one hand, and contribute to othering and the fragmentation of the human subject in law on the other. Unfortunately, the topicality of the refugee situation in Europe, the so-called enhanced interrogation techniques, and the silencing of minority voices, all persist. Asking the question *how* is important, as this may contribute to raising awareness and our ability to re-imagine and reformulate matters. Asking *how* does not, however, directly contribute to change, as the aim is not to propose strategies for improvement. The purpose here is not to proceed to this stage, as that is a different story.



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## **II THE ARTICLES**

